SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-456

IN THE MATTER OF :
:
JESSE JENKINS, III :
:
AN ATTORNEY AT LAW :

Decision

Argued: March 19, 1998

Decided: April 5, 1999

Jay J. Rice appeared on behalf of the District VB Ethics Committee.

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 on a recommendation for an admonition filed by the District VB Ethics Committee ("DEC"), which the Board determined to bring on for a hearing.

This matter arose out of the same probate matter, Robert C. Davis, that caused respondent to receive a six-month suspension in November 1997. In re Jenkins, 151 N.J. 469

(1997). In that case, respondent placed an "S" and wrote a decedent's name on the signature line of a medical authorization to give the impression that the document had been signed by the decedent. In this fashion, respondent fraudulently obtained the decedent's medical records from the hospital. Respondent also misrepresented to hospital officials that he was the attorney for the decedent. In fact, respondent represented two individuals, Ivy Davidson and Joan Beale, each of whom claimed to be related to the decedent. Respondent's misconduct was found to be in violation of RPC 4.1(a) (truthfulness in statements to others), RPC 8.4(a) (attempt to violate the Rules of Professional Conduct,), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).[1]

* * *

The complaint in this matter alleged violations of RPC 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal) and RPC 4.1(a) (truthfulness in statements to others).

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[1] Respondent was originally denied admission to the New Jersey bar in 1978 because of his misconduct in the application process. The Court stated that "[t]hroughout the admission process Jenkins displayed a consistent pattern of untruthfulness. Jenkins' failure to disclose his criminal arrests and his civil actions and his misstatements concerning his employment record all reveal the same design. In each case, he denies the adverse event occurred. Confronted with evidence to the contrary, he offers an inadequate and implausible excuse for not disclosing the incident. Finally, he displays contrition. The pattern is clear and unequivocal. We do not accept Jenkins' explanations." Application of Jenkins, 94 N.J. 458, 468 (1983). After numerous attempts to have his admission reconsidered, respondent was unconditionally admitted to practice in New Jersey in 1992.

The alleged violations took place beginning on July 22, 1994, when the judge assigned to the probate case disqualified respondent from the representation of Davidson and Beale. The disqualification, dated July 22, 1994, was the direct result of respondent's admission to the judge, in June 1994, that he had created the phony medical authorization in order to obtain the medical records and, later, tissue samples from the decedent.

The following unrefuted facts were culled from the testimony of respondent and Tina M. Niehold, attorney for the administratrix in the Davis case:

Subsequent to respondent's disqualification, on September 8, 1994 the judge sent a letter to respondent's former clients notifying them that they had thirty days to obtain new counsel or be deemed pro se. For the next sixteen months the case moved along without any counsel for Davidson and Beale.[2] In or about November 1995 Thomas Ashley took over the case. After several adjourned trial dates, the case was ready for trial in March 1996. On the trial date respondent appeared in court, pursuant to a subpoena issued by Ms. Niehold. The subpoena sought to compel respondent's testimony about his handling of the decedent's tissue samples, which respondent had, prior to his disqualification, sent to a laboratory for DNA testing. Shortly before respondent was to testify about his role in connection with the tissue samples, he handed several documents to Mr. Ashley, who, in turn brought the documents to the court's attention. It later became apparent from those documents that, after

[2]Apparently, at about this time, Beale was dismissed as a party to the action.

his disqualification, respondent had continued to act, and to hold himself out, as the attorney for Davidson and Beale.

Specifically, on January 3, 1995, nearly six months after his disqualification, respondent sent a letter to Roche Bio-Medical Labs ("Roche"), the laboratory examining the tissue samples for respondent. In that letter respondent stated that "[t]his office has retained the Law Firm of Tomkins, McGuire and Wachenfeld to assume handling of the Davis case." Respondent also requested that the laboratory report containing the results of the DNA tests be sent to his office, as well as to the Tomkins firm. Exhibit R-5. On January 4, 1995 respondent sent that report to the Tomkins firm. Exhibit R-8.

On April 20, 1995 respondent sent additional evidence to the laboratory for testing, as evidenced by completed forms signed by respondent. Exhibit G-7. On June 14, 1995 respondent sent Roche several more forms, signed by him, requesting further testing of the samples.

Respondent testified at length about his unsuccessful efforts to secure new counsel for his former clients after he was disqualified from the case. Respondent gave the DEC correspondence to and from various law firms indicating his efforts in that regard. Apparently, of the firms he contacted only the Tomkins firm expressed an interest in the case. According to respondent, that firm wanted to review respondent's DNA reports before taking the case, but respondent had no report yet. Therefore, respondent added, he contacted Roche solely to obtain a report for the Tomkins firm. The Tomkins' firm never agreed to

take the case. Respondent, however, insisted that the firm had initially agreed to handle the matter.[3]

Respondent explained that his actions on behalf of his former clients, after his disqualification, were designed to protect their legal interests. T110. [4] Respondent admitted that he never contacted the court about his concerns and that he should not have contacted the laboratory after his disqualification. Respondent acknowledged that the July 22, 1994 order forbade him from participating in the case, but insisted that he had been moved by a desire to protect his former clients' interest. Respondent stated that Davidson ultimately settled with the estate and was awarded approximately $80,000, of which he received nothing. Respondent asserted that he was never paid for any work on the case and used several thousand dollars of his own funds for expenses related to the DNA issues. Respondent also conceded that he had a series of contacts with both Davidson and Beale after his disqualification.

Finally, respondent's counsel argued that the entire controversy doctrine should be applied to this matter so as to bar the within complaint. According to counsel, because this matter stemmed from the same set of facts as the prior ethics matter, both matters should have been heard together. Failing that, counsel argued, this matter should be dismissed.

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[3]The only evidence on this issue was an introductory letter to Davidson from the Tomkins firm, requesting that she contact the firm in the event that she wished the firm to represent her.

[4]T refers to the transcript of the June 5, 1997 DEC hearing.

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The DEC found violations of RPC 3.4(c) and RPC 4.1(a) for respondent's continued representation of Davidson and Beale after his disqualification. The DEC recommended the imposition of an admonition, noting in mitigation that, had respondent not stepped in when he did, Davidson would likely not have received a share of the Davis estate.

* * *

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

The record makes it clear that respondent violated the July 22, 1994 order disqualifying him from the case. Respondent conceded that in January 1995 he had communicated with Roche to attempt to establish that his clients were related to the decedent. In a January 3, 1995 letter to the laboratory, respondent falsely stated that his firm had retained the Tomkins firm to assume the representation of his clients. In fact, the Tomkins firm never accepted the representation of Davidson & Beale. What is more, having been disqualified from the case, respondent could not "retain" anyone. More probably, his letter was an effort to remain "in the loop" in the case. Fortunately for respondent, there was insufficient evidence that the letter was intended to represent to Roche that there was a co-counsel arrangement, with respondent as the lead attorney. Respondent, however, had no

explanation for his failure to disclose to the laboratory that he had been removed from the case. The Board found that respondent's conduct in this regard was a violation of RPC 4.1(a).

To compound matters, respondent sent additional evidence to the laboratory for testing on April 20, 1995. On June 14, 1995 he requested further tests on those samples. Respondent also had numerous contacts with his former clients about the case, after his disqualification. By his own admission, respondent knew at the time that he was violating the court order disqualifying him. Regardless of respondent's advanced noble motives, there was no excuse for his actions. The Board found that respondent's conduct in this context violated RPC 3.4(c).

The Board rejected the argument that the entire controversy doctrine barred the within complaint. That doctrine is not applicable to disciplinary matters. Where, however, the conduct in a subsequent disciplinary matter is so intertwined with the ethics offenses in a prior matter in terms of the timing of the misconduct, and where the measure of discipline would not have been enhanced if both matters had been heard together, no additional discipline might be appropriate. Such is not the case here. Although respondent's actions in both matters arise from the same case, they were altogether different and were committed at different times. Moreover, had this matter been heard together with the previous matter, it would likely have resulted in more serious discipline than a six-month suspension.

In short, respondent's conduct was serious and aggravated by the fact that, as early as June 1994, he was on notice that it was proscribed, for he admitted to the judge then that he had created the false medical authorization. That admission prompted the first disciplinary proceeding. Respondent's repeated disregard for that court order, entered less than one month after his admission of wrongdoing in the first case, was inexcusable. That respondent's intervention might have benefitted Davidson is irrelevant. Respondent knew that he was forbidden to take any action in the case after July 22, 1994. Any concerns he may have had about protecting his former clients should have been made known to the court. Instead, respondent resorted to self-help by continuing to represent his former clients.

In light of the foregoing, the Board determined to impose a three-month suspension, consecutive to the earlier six-month suspension imposed in November 1997. See In re Brady, 110 N.J. 217(1988) (three-month suspension imposed where the attorney continued to represent clients after having been discharged by them, took actions contrary to clients' wishes and made an ex parte application to the judge for a consent order without notice to the parties.) One member would have imposed a reprimand.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Dated: 4/5/99

LEE M. HYMERLING
Chair
Disciplinary Review Board