SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
DOCKET NO. DRB 97-458

IN THE MATTER OF

S. MICHAEL NAMIAS,

AN ATTORNEY AT LAW

Decision

Argued: February 5, 1998

Decided: September 28,1998

Carol Perez appeared on behalf of the District VIII Ethics Committee.

Thomas J. Welchman appeared on behalf of respondent.

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

This matter was first before the Board on October 17, 1996, based on a recommendation for an admonition filed by the District VIII Ethics Committee ("DEC"). The three-count amended complaint charged respondent with a violation of RPC 1.1(a) (gross-neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.16(b) (failure to turn over a client's file) and RPC 8.1(b) (failure to cooperate with the DEC) (the Scannell matter); RPC 4.1(a)(1) (truthfulness in statements to third parties), RPC 8.1(b) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (the Cuzzo matter) and RPC 5.5(a) (unauthorized practice of law). During the hearing, the presenter withdrew the allegations of failure to cooperate with the DEC.

Following a review of the record, the Board determined to remand to the DEC that aspect of the matter that related to allegations that respondent practiced law while on the ineligible list for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"). For the reasons discussed below, after a hearing the DEC recommended that these charges be dismissed. Although the Board retained jurisdiction in this matter, the DEC secretary thereafter mistakenly informed the grievant in Scannell that his matter had been dismissed, causing some confusion in the record.

The Board considered this matter again on November 20, 1997, at which time the Board determined to bring the entire case on for hearing.

Respondent was admitted to the New Jersey bar in 1972. During the time relevant to the within matters, respondent was an attorney in North Brunswick, Middlesex County. As of the date of the second DEC hearing, respondent was not practicing law. He has no history of discipline.

The Cuzzo Matter (District Docket No. VIII-97-024E)

On or about September 7, 1991 respondent signed a letter of protection on behalf of a client, Abu Rogers, which was forwarded to Dr. Dennis Cuzzo, Rogers' treating chiropractor. The letter authorized respondent to deduct from Rogers' settlement the full amount of the unpaid medical bill.

Respondent received the settlement proceeds in or about August 1994. He did not inform Dr. Cuzzo of the settlement or forward to Dr. Cuzzo the $393 owed to him, which remained in respondent's trust account. In early October 1994 Dr. Cuzzo contacted respondent, learned of the settlement and reminded him of his obligation to see that Rogers' bill was paid. Respondent did not forward the $393 to Dr. Cuzzo. Thereafter, Dr. Cuzzo called respondent on two occasions, asking

for payment. Respondent assured him that he would mail a check later that day, but did not.

By letter dated November 10, 1994 Dr. Cuzzo advised respondent that, if the check was not forthcoming, he would seek redress through the courts. In December 1994 Dr. Cuzzo filed a small claims action against respondent. Respondent did not appear on the scheduled hearing date due to a scheduling conflict. A judgment was entered against respondent on January 26, 1995 for $393 plus costs of $15. Dr. Cuzzo ultimately collected his money after a levy was placed on respondent's trust account.

Respondent explained that he did not disburse Dr. Cuzzo's funds because of his client's instruction to attempt to negotiate a reduction in Dr. Cuzzo's bill. Respondent testified that Dr. Cuzzo was unwilling to reduce the bill. Thereafter, respondent was unable to contact Rogers.[1] Respondent testified further that he had fully intended to mail the check to Dr. Cuzzo when he told the doctor that he would do so, but became busy doing other things in his office. Respondent also contended that he was experiencing personal problems during the time in question.

* * *

The DEC dismissed this matter, determining that, "although the respondent could have acted in a better fashion," there was no real harm to Dr. Cuzzo. The DEC noted that Dr. Cuzzo's money was held in trust and that, although it took five months and a lawsuit, his bill was ultimately paid.[2]

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[1] Dr. Cuzzo's testimony was unclear as to whether respondent contacted him about reducing the bill.

[2] During the presenter's closing argument, she alluded to a violation of RPC 1.15(b) (failure to notify a third-party of funds in the attorney's possession). The Board did not consider that charge, however, because neither was the complaint formally amended nor was the issue fully litigated at the hearing.

The Scannell Matter (District Docket No. VIII-97-023E)

In 1988 Edwin J. Scannell retained respondent in connection with an employment matter. One or two months later, Scannell paid respondent a $500 retainer. According to Scannell, over the course of the following four to six years, he visited respondent's office twenty-five or thirty times and called "a couple hundred times." Scannell testified that respondent had him believe that he had filed suit in his behalf, although he had not said that in so many words. In fact, respondent never filed suit in Scannell's behalf.

Respondent, in turn, testified that he investigated Scannell's case and also hired an expert to evaluate the merits of the case.[3] At some point respondent and Scannell met with the expert, who advised Scannell that he was pessimistic about his claim. Respondent advised Scannell that the case "looked bad" and that it would be expensive to pursue. Scannell, however, instructed respondent to continue to pursue the case. Respondent testified that after further research he determined that Scannell would not prevail in his suit. He did not, however, apprise Scannell of this discovery because he was concerned about Scannell's reaction. Respondent also feared that the information would set off Scannell's drinking problem.

Respondent denied Scannell's contention that he had called respondent hundreds of times. Respondent admitted in his answer, however, that he should have ended his representation of Scannell.

Scannell testified that, on two occasions in or about 1991 and 1992 he consulted with other attorneys and then asked respondent to release his file. According to Scannell, respondent replied

[3]Respondent paid the expert $500 and, therefore, received no compensation for his work in Scannell's behalf.

that they were "almost at the end of this line" and that the matter would soon be resolved. Scannell, therefore, agreed to allow respondent to continue the representation. Contrarily, respondent testified that Scannell never told him that he had met with other attorneys and denied that Scannell asked him for the file.[4] Furthermore, in his answer, respondent claimed that his statement to Scannell was that they should bring the matter to a close, not that the matter was almost concluded.

According to respondent, on an undisclosed date Scannell left a message on his answering machine, conveying his feeling that respondent did not want to handle his case. Respondent closed Scannell's file approximately two months later.

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The DEC determined that, although respondent was concerned with Scannell's mental and emotional well-being, he did not act with diligence and, therefore, violated RPC 1.3.

Practicing While Ineligible

The amended complaint alleged that respondent practiced law in 1993 and 1994 while he was on the ineligible list for failure to pay the annual assessment to the CPF. Respondent did not testify about these allegations during the first DEC hearing. His counsel explained that respondent "may have an issue of his fifth amendment protection because there's an issue here of practicing law without a license, which is a crime in New Jersey...." Thereafter, the presenter attempted to introduce into evidence a letter from Brian D. Gillet, Deputy Ethics Counsel, Office of Attorney

[4]The other attorneys Scannell consulted never contacted respondent.

Ethics ("OAE"), advising the presenter that respondent had practiced law while ineligible.[5] For reasons that are not clear, the DEC did not consider Gillet's letter. The presenter also sought to continue the hearing to introduce records and testimony from a CPF staff member. Respondent objected to continuing the hearing. Again, for reasons that are unclear, the DEC dismissed this count of the complaint.

On remand, respondent's counsel admitted that the payments to the CPF had not been made, explaining that respondent had experienced personal and secretarial problems.[6] Counsel went on to explain that respondent continued to practice law, not knowing that the payment had not been made.

Respondent suffered a stroke on September 30, 1996, between the two DEC hearing dates. As of the second DEC hearing, he was not practicing law and was undecided as to whether he would practice in the future. Trustees have been appointed to oversee his practice.

* * *

The DEC recommended the dismissal of this charge, on the basis that respondent had been unaware that he had not paid the assessment and had made the payment on discovering his dereliction. The DEC also concluded that, since respondent was already facing discipline in the Scannell matter, no further discipline was required.

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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 was fully supported by clear and convincing

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[5]On June 6, 1995 respondent paid his assessment for 1993, 1994 and 1995.

[6]At some point respondent joined his practice with that of another attorney. That arrangement afforded him full-time secretarial help to better organize his practice.

evidence. The Board disagrees in part, however, with the specific findings of the DEC.

The DEC's dismissal of the Cuzzo matter was appropriate. While respondent should have acted more quickly to pay Dr. Cuzzo the $393 he was owed, respondent apparently had some difficulty contacting his client, partially explaining the delay in paying the bill. There is no question, however, that the funds were kept intact in his trust account. Although clearly, it should not have taken a small claims court proceeding and a levy for Dr. Cuzzo to be paid, the five-to six- month delay in this matter does not rise to the level of unethical conduct requiring discipline.

As to the Scannell matter, although respondent regularly communicated with Scannell, he failed to inform him that the case was weak and that he would not be pursuing it. An attorney has an obligation to be straightforward with his or her clients, even if he must be the bearer of bad tidings. By doing little in Scannell's behalf and failing to apprise him of the problems in the case, respondent violated RPC 1.3 and RPC 1.4(b).

As to the other allegations in Scannell, there is no clear and convincing evidence that Scannell asked for his file and that respondent failed to turn it over to him. In fact, it is logical to infer that respondent would be glad to bail out of the representation. Similarly, the allegations of a violation of RPC 1.1(a) and RPC 1.4(a) have not been proven. Respondent apparently did take some action on behalf of his client and communicated with him. The impropriety was in respondent's failure to apprise Scannell that he would not pursue his claim.

On the other hand, the DEC's dismissal of the allegation that respondent practiced law while ineligible was inappropriate. By his own admission, respondent was guilty of the charged violation, albeit inadvertently. It is undeniable, thus, that respondent violated RPC 5.5(a).

Were it not for this last violation, an admonition would have been appropriate for respondent's violation of RPC 1.3 and RPC 1.4(b) in the Scannell matter. However, respondent must bear the ultimate responsibility for his failure to pay the CPF, despite alleged personal problems and problems in his office. Thus, the Board unanimously determined that a reprimand is more commensurate with respondent's ethics transgressions. See In re Costanzo, 115 N.J. 428 (1989) (reprimand imposed when the attorney failed to keep a client advised of the status of a matter or to carry out a contract of employment and practiced law while on the ineligible list) and In re Wurth, 131 N.J. 453 (1993) (reprimand for, among other things, lack of diligence, failure to turn over a file and practicing law while on the ineligible list). One member did not participate.

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

Dated: 9/28/98

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD