

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-051

IN THE MATTER OF
JOHN H. C. WEST III
AN ATTORNEY AT LAW

Decision

Argued: March 20, 1997

Decided: June 3, 1997

Frank Corrado appeared on behalf of the District I 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 discipline filed by the District I Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (lack of communication) , RPC 1.4(b) (failure to explain matter to client to permit client to make decision) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

This matter was previously before the Board on a motion for discipline by consent. R. 1:20-10(b)(1) limits the time within which an affidavit of discipline by consent may be submitted to no later than sixty days after the time prescribed for the filing of an answer. However, the consent in the instant matter was signed one year after the filing of the complaint. Hence, the Board rejected the motion for discipline by consent as untimely. Because the matter had been the subject of a hearing and panel report prior to the execution of the consent, the Board retained jurisdiction and determined to conduct a hearing, rather than remand the case to the DEC.

Respondent was admitted to the New Jersey bar in 1989 and maintains a law office in Ventnor, New Jersey. On February 15, 1996, he received an admonition for lack of diligence and failure to communicate. There is pending against respondent a Motion for Temporary Suspension for failure to comply with a fee arbitration order.

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The Tracy Matter

In September 1991, Margaret and James Tracy ("Grievants") retained respondent to assist them in restoring Mr. Tracy's driver's license, which in 1979 had been suspended for five years for Mr. Tracy's driving while intoxicated. Although the record is not clear on this point, it was Mr. Tracy's second or third such violation. Grievants attempted to find out from the Division of Motor Vehicles ("DMV") the steps that had to be taken to restore Mr.

Tracy's driving privileges. After much difficulty in this endeavor, grievants decided to hire respondent to assist them. The DMV had indicated that Mr. Tracy would be required to attend a sixteen-week course at the Alcohol Countermeasures Clinic. Respondent visited grievants at their home and sent them a letter on September 27, 1991, requesting a fee of \$250 and enclosing a copy of a letter to Maurice R. Guadagno, Manager, Correspondence and Inquiries, State of New Jersey. According to grievants, respondent asserted that he had prior experience with Mr. Guadagno and predicted that the driver's license restoration would be completed within two weeks. Indeed, Mr. Tracy testified that respondent guaranteed that he would get Mr. Tracy's driver's license restored.

Respondent encountered more difficulty than he apparently had anticipated in receiving information from DMV. DMV staff insisted that Mr. Tracy take the alcohol course as a condition of the restoration of his driver's license. Respondent wrote to grievants on May 13, 1992, indicating that he was still awaiting a response from DMV as to the legal authority for this requirement. The DMV must have sent an unsatisfactory response as, on June 16, 1992, respondent sent a letter to Mr. Tracy as follows:

Enclosed please find two letters I received. Please note the second page of the June 3, 1992, 'letter of recommendation from IDRC.' I am endeavoring to determine what this means. Please be patient. These people are unbelievable!

Thank you.

Grievants sent a letter to respondent on August 2, 1993 complaining that almost two years had elapsed since he represented to them that Mr. Tracy would have his license back

“very soon” and that, despite having paid him \$250, they had made no progress. Respondent replied as follows in a letter dated August 11, 1993:

I have received your letter of August 2, 1993. I agree with the contents of same. I hit a wall previously with D.M.V. I promise you that I will renew my efforts to obtain Jim's license.

Further, I am aware of the importance of this matter to you and your family.

I will be in contact with you shortly and will advise you of any progress or future correspondence with D.M.V.

Thank you.

Grievants testified that they had no further contact with respondent. Although they telephoned respondent on approximately ten occasions, leaving messages on an answering machine, grievants never received a return telephone call.

The Kimley Matter

On October 5, 1994, Delores Kimley retained respondent to represent her son Edward Kimley (“Grievant”) in an appeal of the denial of grievant's request for parole. Grievant was incarcerated at Bayside State Prison for distribution of controlled dangerous substances. His request for parole had been denied. After grievant obtained respondent's name from another inmate, his mother arranged for the representation. Mrs. Kimley paid respondent a flat fee of \$1,500, in exchange for which respondent agreed to obtain transcripts of the parole hearing and file an appeal. Respondent indicated to Mrs. Kimley that he had served on the

Parole Board and had represented many inmates on parole appeals. He also asserted that the appeal would be completed by January 1995.

Mrs. Kimley wrote to respondent on December 3, 1994 requesting that he assist grievant in obtaining work release and furlough privileges. Respondent replied by letter dated December 12, 1994, expressing his hope of receiving the transcript by December 17, 1994 and, of filing the appeal by the first week of January. He added that he was having difficulty reaching Mrs. Kimley by telephone and asked her to tell her son "that everything is moving along okay and I will try to get him the programs he needs" (Exhibit PK-2). Not hearing from respondent, Mrs. Kimley left numerous messages on his answering machine. Respondent did not return her telephone calls. Finally, on February 5, 1995, Mrs. Kimley wrote to respondent, complaining that, although she had paid him in full for his services, he had failed to obtain the transcript, perfect the appeal or even meet with her son.

Respondent sent grievant a handwritten letter on February 23, 1995, claiming that he had finally received the transcript, despite having ordered it on December 17, 1994 on an expedited basis. He indicated that he was in the process of preparing a letter-brief and would be visiting grievant very shortly. Grievant wrote to respondent on February 26, 1995, enclosing five pages of notes to be incorporated into the appellate brief by respondent. He also requested that respondent contact Lisa Little, the prison psychiatrist, to obtain proof that no counseling was available at the prison. Apparently, grievant felt that, during his parole hearing, two parole board members had been critical of his failure to participate in group or

individual counseling. Therefore, grievant requested respondent to secure a letter from Ms. Little indicating that no counseling had been available at the prison for three years.

Respondent wrote to grievant on March 13, 1995, claiming again that he was drafting the appeal papers and indicating that he would incorporate grievant's notes into the appellate brief. On the same date, he wrote to Lisa Little, requesting information about the availability of counseling at the prison.

Finally, on May 5, 1995, Mrs. Kimley wrote to respondent, terminating his representation of grievant and requesting a refund in the amount of \$1,200. She expressed hope of resolving the matter without resorting to the courts or the ethics committee. Receiving no contact from respondent, Mrs. Kimley filed a grievance against him on May 29, 1995.¹

At the ethics hearing, Mrs. Kimley testified that, from October 1994 through May 1995, she telephoned respondent seventy-two times. She produced her telephone bills documenting her attempts to contact respondent. Mrs. Kimley testified that respondent never filed the parole appeal. Grievant testified that he was released on December 5, 1995, after a second parole hearing.

Respondent did not appear at the ethics hearing. The record reflects that the hearing had been adjourned before at respondent's request due to his participation in a complex jury

¹ The secretary of the district ethics committee did not accept Mrs. Kimley's grievance because she was not the client. At the secretary's suggestion, her son submitted the grievance.

trial involving six attorneys. The panel chair indicated on the record that, after the ethics hearing had been rescheduled to accommodate respondent's trial schedule, respondent had requested a second adjournment, claiming that he was ill. This request, made by telephone on the day before the hearing was to take place, was denied. However, a subsequent hearing was scheduled to permit respondent the opportunity to present evidence or argument in opposition to the proofs offered by the presenter. Although respondent did not appear at the later hearing, his attorney attended, asserting that he had expected respondent to appear.

* * *

The DEC found clear and convincing evidence that respondent violated RPC 1.1(a), RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.4(b) and RPC 8.1(b). In the Tracy matter, the DEC found that, despite representing grievants for two years, respondent failed to resolve Mr. Tracy's problems with DMV. The DEC noted that respondent made very little progress in the matter, took much longer than the problem required and took no action, even after receiving an August 11, 1993 letter from grievants complaining of his lack of attention. The DEC found that respondent failed to act with reasonable diligence, failed to communicate with grievants and failed to explain the steps necessary to resolve their problem, contrary to RPC 1.3, RPC 1.4(a) and RPC 1.4(b).

In the Kimley matter, the DEC found that respondent represented that he would immediately order the transcript of the appeal hearing and file an appeal, having received a

fee of \$1,500 in advance. The DEC found that respondent did not order the transcript until four months after he was retained, never filed an appeal from the denial of parole, and never responded to Mrs. Kimley's request for a refund of a portion of the attorney's fee. The DEC pointed out that grievant was released from prison, not as a result of respondent's representation, but after a second parole hearing. The DEC found that respondent's failure to timely order the transcript and to file the appeal constituted gross negligence and lack of diligence, in violation of RPC 1.1(a) and RPC 1.3, respectively. Moreover, the DEC found that respondent's failure to communicate with grievant and Mrs. Kimley violated RPC 1.4. The DEC concluded that respondent's misconduct in the Tracy and Kimley matters, when added to a prior finding of misconduct in another matter, constituted a pattern of neglect, contrary to RPC 1.1(b). Finally, the DEC found that respondent violated RPC 8.1(b) by failing to produce his files in the Tracy and Kimley matters and by failing to file a written response to the Kimley grievance.

* * *

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.

In the Tracy matter, the record clearly and convincingly demonstrates that respondent accepted a fee of \$250 to assist the Tracys in securing the restoration of Mr. Tracy's driving

privileges. Respondent permitted two years to elapse before grievants finally terminated his representation. At first, respondent made some attempt to determine from DMV what steps Mr. Tracy would be required to follow, including whether he had to complete the sixteen-week alcohol course. No doubt respondent was frustrated by a lack of cooperation or knowledge on the part of DMV staff as to what the governing law was in 1979, when Mr. Tracy's driver's license was suspended. However, respondent simply neglected to take the action necessary to complete the matter for which he had been compensated in advance or, at a minimum, to communicate with grievants as to why he had not completed the matter. After grievants wrote to respondent complaining of his inaction, he asserted that he would renew his efforts. That was the last contact grievants had with respondent. Accordingly, respondent violated RPC 1.3, RPC 1.4(a) and RPC 1.4(b).

With regard to the Kimley matter, too, there is clear and convincing evidence that respondent accepted payment in full and then neglected the matter. He was retained in October 1994 to file an appeal on behalf of Edward Kimley from an adverse decision of the Parole Board. Respondent represented to grievant that he would immediately order the transcript of the parole hearing and file the appeal by January. Instead, as found by the DEC, he ordered the transcript in mid-February, four months after he was retained. The evidence adduced at the hearing showed that grievant's mother, who had paid respondent's fee of \$1,500, left seventy-two messages on respondent's answering machine. Respondent did not return any of these telephone calls and never filed the parole appeal. Rather, grievant was released from jail after he received a second parole hearing. Respondent demonstrated gross

neglect and lack of diligence in this matter, as well as a lack of communication, all in violation of RPC 1.1(a), RPC 1.3 and RPC 1.4. The DEC properly found that respondent's lack of attention in the two matters before it, coupled with a prior admonition for a violation of RPC 1.3 and RPC 1.4(a), constituted a pattern of neglect, contrary to RPC 1.1(b).

As mentioned earlier, the DEC found a violation of RPC 8.1(b) for failure to submit a written response to the Kimley grievance and failure to produce his file in both Kimley and Tracy. However, respondent did file an answer to the complaint addressing both matters. His attorney appeared at the DEC hearing. Respondent also appeared at the hearing before the Board. In addition, the Board considered that, as noted in the panel report, respondent appeared to be suffering severe emotional problems as a result of the recent death of his parents and of a traumatic event suffered by his wife. Respondent's failure to submit a written response and to produce his files was symptomatic of his inability to confront and address problems. Under the circumstances, the Board found that respondent did cooperate and dismissed the RPC 8.1(b) charge.

As to the quantum of discipline, the DEC initially recommended a six-month suspension, but then entered into a consent with respondent to a one-year suspension, ostensibly to permit respondent additional time to recover from his emotional problems. However well-intentioned the recommendation for discipline, it was excessive for respondent's misconduct.

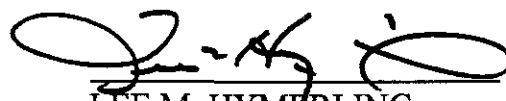
In In re Brantley, 139 N.J. 465 (1995), the attorney exhibited a lack of diligence in two matters, also failing to communicate in one of them, failed to cooperate with the DEC

in three matters (one of which was dismissed) displayed a pattern of neglect and had received a prior one-year suspension and three reprimands. He received a three-month suspension. Similarly, in In re Marlowe, 121 N.J. 236 (1990), the attorney was suspended for three months after engaging in a pattern of neglect in two cases: failing to file a complaint in a personal injury matter and abandoning another case after accepting the representation. He also failed to communicate with the clients and in one matter, misrepresented the status of the case. Aggravating factors included lack of cooperation with the DEC investigator and a prior reprimand.

In light of the foregoing, and particularly of the mitigating circumstances in this case, the Board unanimously determined that a three-month suspension was adequate discipline for respondent's ethics infractions. In addition, the Board required respondent to prove his fitness to practice law before reinstatement. Two members did not participate.

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

Dated: 6/3/97


LEE M. HYMERLING
Chair
Disciplinary Review Board