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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-337

IN THE MATTER OF :
DOUGLAS R. SMITH, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 16, 1994

Decided: March 10, 1995

David K. Chazen appeared on behalf of the District IIA Ethics Committee.

Respondent did not appear for oral argument, despite proper notice of the hearing.

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 public discipline filed by the District IIA Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (lack of communication), RPC 1.16(d) (failure to return a file) and RPC 8.1(b) (lack of cooperation).

Respondent was admitted to the New Jersey bar in 1974 and maintained an office in Fair Lawn. On March 14, 1994, respondent was suspended from the practice of law for one year, effective April 11, 1994, for gross neglect, pattern of neglect, lack of

diligence, misrepresentation, and failure to advise his client to obtain independent counsel before entering into a business relationship. In addition, respondent was privately reprimanded on November 23, 1993 for failure to disclose multiple representation in a 1987 real estate matter and for failure to file an answer to the formal ethics complaint.

The facts of this matter are as follows:

Steven T. Francesco retained respondent in April 1992 to file an appellate brief due April 24, 1992, to obtain Francesco's matrimonial file from his most recent attorney, and to vacate or modify an open arrest warrant arising from Francesco's non-compliance with a court order. As a result of the warrant, if Francesco ever returned to New Jersey, he would be arrested.

By way of background, Francesco had discharged his prior counsel, Harold Poltrok, who had initiated the appeal. Prior thereto, Francesco had retained the firm of Cole, Schantz, which refused to continue with the representation as a result of non-payment of fees and which had a lien against the Francesco file for \$113,000. Francesco explained that the "six-week trial" had culminated in a substantial equitable distribution award of at least "\$100,000 up front" and \$300,000 in later payments.

The trial judge summarized his findings of the "13-day trial" in a letter-opinion dated May 4, 1989. He noted that there had been fourteen court orders entered by four different judges since Francesco had filed for divorce in 1987. The judge described the matter as "the most overlitigated matrimonial case" in his ten

years on the bench and noted the intense hostility of the parties and their respective counsel. Respondent, in turn, described Francesco as "an extremely difficult man to deal with . . . [who] can be extremely charming . . . articulate . . . a computer wizard . . . [yet] driven to distractions to win over his wife at any cost." 2T78¹.

* * *

Respondent received an extension until May 1, 1992 to file the brief in the appeal initiated by prior counsel. Respondent filed a brief and appendix that were marked "received" by the Appellate Division on May 1, 1992 and that also bore the notation "deficient." Exhibit C-1 in evidence at Exhibit Q. Respondent then filed a brief with a corrected appendix, as mentioned in his transmittal letter to the appellate court dated May 26, 1992, which has a handwritten memo at the bottom indicating that it was "received in Appellate Division on May 28, 1992 and approved for filing." Exhibit C-1 in evidence at Exhibit X.

Meanwhile, on May 19, 1992, the former Mrs. Francesco filed, pro se, a motion to dismiss Francesco's appeal. Although the reply to this motion was due on June 15, 1992, time was extended for another ten days by order dated July 21, 1992. Exhibit C-1 in evidence at Exhibits R through V. In the motion, Mrs. Francesco argued: (1) that the October 25, 1991 judgment of divorce was an interlocutory order; (2) that a motion for a stay should have been filed with the lower court; (3) that Francesco incorrectly stated

¹ 2T refers to the transcript of the DEC hearing on May 24, 1994.

in his case information statement that all issues were resolved; (4) that the notice of appeal lacked certification of service; and (5) that Francesco was essentially trying to vacate a 1989 order from which he should have appealed on time. Respondent did not file an objection to the motion, as a result of which the appeal was dismissed with prejudice on August 27, 1992. Respondent justified his failure to object to the motion by claiming that the parties were attempting to resolve the issues themselves and that it was his strategy to assist them in the negotiation. Respondent believed that the parties, rather than the courts, could work out a resolution more favorable to Francesco.

On May 4, 1992, about a month after being retained by Francesco, respondent wrote to Mrs. Francesco to discuss the appeal and a possible settlement and to encourage her to consult with an attorney. Exhibit RS-G. (Apparently, Mrs. Francesco was pro se for awhile). Mrs. Francesco called respondent on May 13, 1992, only one day before she filed her motion to dismiss Francesco's appeal. Respondent wrote to her again in December 1992. The parties also tried to resolve the issues on their own for the remainder of 1992 and into 1993. In fact, Mrs. Francesco telefaxed a proposed agreement to respondent (although the agreement is undated, the telefax transmittal date appears to be April 13, 1993), mentioning her discussion of it with Francesco the previous night. Exhibit RS-I in evidence.

On November 20, 1992, respondent wrote to Francesco indicating that he would (1) obtain the files, (2) file a motion to vacate or,

in the alternative, modify the open arrest warrant so as to permit him to take restricted travel in New Jersey, and (3) reinstate the appeal. By March 26, 1993, however, respondent still had not done what he had promised.

On December 10, 1992, respondent prepared, but did not file, a motion to amend the bench warrant to permit Francesco to travel through New Jersey (ostensibly to visit his ailing father in Pennsylvania). On January 14, 1993, respondent also prepared, but apparently did not file, an appellate motion to restore Francesco's appeal. Exhibit C-1 in evidence at Exhibits Y and Z. As the DEC presenter noted in a memorandum dated May 23, 1994, respondent's file did not contain any documentation that those motions had been received by the Chancery and Appellate Divisions. Respondent testified that he did not file the motion in the Chancery Division because the informal, handwritten medical "memo" only indicated that Francesco's father was diabetic and at home, and thus seemed insufficient to support the motion. 2T100. The record is not clear as to whether respondent offered any explanation for the apparent failure to file the appellate motion.

Francesco filed a grievance against respondent on January 7, 1993, incorrectly dated 1992. Francesco acknowledged that he filed a grievance "basically [to] threaten [respondent]." A formal ethics complaint was filed on March 26, 1993, to which respondent did not file an answer.

Francesco alleged that he logged over 200 phone calls to respondent in nine months during 1992-93 — as many as ten to

fifteen calls a day — as well as several telefaxes.

Respondent contended that Francesco rarely answered his initial phone calls, was "almost never available" and was "always in a conference or out of the office." Eventually, however, Francesco returned most of respondent's calls. Respondent kept logs of calls received in his office and whether he took the calls himself. Respondent indicated that Francesco usually called five or six times a day and that those calls were always returned. However, as respondent acknowledged, the calculations contained in the record tended to show that only twenty percent of Francesco's calls were returned.

At the DEC hearing, the presenter noted that respondent eventually turned over to him the files that the presenter had requested, about six inches thick. The files showed that respondent had attempted to obtain the prior files from Francesco's prior counsel and had performed some work on the matter.

As to the charge of failure to cooperate with the DEC, respondent testified that he had not replied to the DEC's inquiries about the grievance because the parties were still in the process of attempting to resolve the issues themselves. Respondent added that Francesco still wanted him to proceed with the representation, notwithstanding the filing of the grievance in January 1993 and that Francesco had contacted the DEC only to "inspire him into action." Mr. Francesco's telefax to the DEC, dated June 25, 1993, reiterated a prior request to "freeze all actions against [respondent]... [he] has since been supportive and forthright in

trying to resolve all the open issues . . . and to be more responsive to my inquiries . . . I will periodically contact you to keep you abreast of my status and progress." 2T12-13.

Respondent testified that the settlement negotiations between the parties had continued through 1992 and 1993 and that, at one point, the former Mrs. Francesco had even suggested that they meet to try to resolve issues, rather than go through the appeal process. According to respondent, the parties met and were "actually civilized and . . . completed 90 percent of a negotiated settlement."

It was respondent's belief that he had made progress not achieved by a handful of prior attorneys; he wondered if he was not "suckered by the client, who was keeping [him] on a tickler under the threat of an ethics complaint." 2T14.

* * *

At some point after the divorce, Mrs. Francesco filed for bankruptcy and obtained a discharge of most of her debts, with the proceeds of the house sale applied chiefly to legal fees. 2T28. Francesco also discussed filing bankruptcy through an attorney in California so that his ex-wife would incur great expense. 2T68.

Respondent did not know whether the appeal had ever been reinstated or whether the open arrest warrant had been modified.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had violated RPC 1.3 (lack of diligence) and RPC 8.1(b) (lack of cooperation with a disciplinary authority). The DEC found

no violations of RPC 1.1, 1.4 or 1.16(d).

The DEC specifically concluded that respondent had ignored its requests for information about the grievance, namely, the investigator's letters of January 25 and February 8, 1993, as well as the formal complaint of March 26, 1993, the amended complaint of November 30, 1993, and the subpoena duces tecum of December 22, 1993. The DEC found that respondent's failure to cooperate was unreasonable, notwithstanding Francesco's efforts to keep respondent on a "tether."

The DEC noted respondent's acknowledgement that he should have replied to Mrs. Francesco's motion to dismiss the appeal and should have informed his client in writing of his strategy.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent violated RPC 1.3 and RPC 8.1(b) is fully supported by clear and convincing evidence.

Respondent admitted responsibility for his failure to reply to Mrs. Francesco's motion. He conceded that he should have objected to the motion to protect Francesco. Respondent defended his conduct on the basis of his belief that Mrs. Francesco's papers did not address "appropriately the appeal" and that she would have to refile her papers. He also perceived himself as a "mediator."

Respondent's intentions may have been good — to produce the best results for his client. Nevertheless, respondent had the duty

to proceed properly and promptly with the pending matters before the courts in order to protect his client's interests. In his effort to reach an agreement between the parties, respondent overlooked his obligation to safeguard his client's interests. If respondent wished to continue the negotiations without the specter of Mrs. Francesco's motion to dismiss the appeal, he should have sought the withdrawal of her motion. As a result of his inaction, Francesco's appeal was dismissed with prejudice.

Respondent also failed to reply to the DEC's requests for information about the grievance and to file an answer to the formal ethics complaint. That he believed that his continued representation of Francesco obviated the need to communicate with the ethics authorities and to file an answer to the complaint is no excuse. As noted earlier, respondent is no stranger to the disciplinary system, having received a private reprimand in 1987 and a one-year suspension in 1994. He was, thus, aware of his obligation to cooperate with the DEC.

In the absence of respondent's prior ethics history, a reprimand would have been appropriate discipline for his failure to pursue the appeal. See In re Gaffney, 133 N.J. 64 (1993) and In re Russell, 110 N.J. 329 (1988). However, in view of respondent's ethics violations in this matter and of the obvious conclusion that he has not learned from his prior mistakes, the Board unanimously recommends that a six-month suspension be imposed, to run consecutively to the one-year suspension still in effect. The Board also recommends that, prior to his reinstatement, respondent

be required to complete eight hours in Professional Responsibility courses offered by the Institute for Continuing Legal Education (ICLE). Two members did not participate.

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

Dated: _____

3/10/95

By: _____



Raymond R. Trombadore
Chair
Disciplinary Review Board