

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-286

IN THE MATTER OF :
:
DONALD B. DEVIN, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 20, 1993

Decided: February 28, 1994

David L. Johnson appeared on behalf of the District X Ethics Committee.

Clifford Weininger appeared on behalf of respondent.

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 X Ethics Committee (DEC).

Respondent was charged with, and the DEC found, various violations of the Rules of Professional Conduct, including RPC 1.4(a) (failure to keep client reasonably informed); RPC 1.7(b) (conflict of interest); RPC 2.1 (failure to exercise independent professional judgment); RPC 4.1(a) (making false statements of

material fact and failure to disclose material facts to third persons); and RPC 8.4(c) (misrepresentation and dishonesty).

Respondent was admitted to the New Jersey Bar in 1969. Following employment for a time as house counsel for an insurance company, respondent entered private practice. Initially, he practiced with several law firms of moderate size. Since 1983, he has been a sole practitioner.

In 1991, respondent was hired by Marc Galperin (hereinafter Galperin) to represent him in two separate matters. The first concerned a foreclosure action against Galperin's personal residence; the second concerned litigation instituted by both Midlantic National Bank and Galperin's father, Hy Galperin, against Galperin and his wife. The civil action charged Galperin with fraudulently obtaining a loan involving his business, Hy's Appliances, and also with conveying his father's stock in the corporation to himself, without his father's knowledge. At the time of the representation, Galperin was in serious financial difficulties. The matters were eventually settled, with the requirement that Galperin pay a total of \$380,000 as settlement.

When Galperin was unable to obtain the necessary financing to pay the settlement, respondent advised him that he knew someone who had previously been able to place difficult mortgages. In fact, that individual was a client of respondent, John Bookhart. Respondent represented Bookhart in a criminal proceeding in Morris County, wherein Bookhart ultimately entered a guilty plea to the fourth degree crime of "theft of services." Respondent did not to

disclose to Galperin that Bookhart had been criminally convicted of theft of services as a result of that proceeding. Respondent introduced Galperin to Bookhart.

In his testimony before the DEC, respondent admitted that he had failed to disclose the nature of his representation of Bookhart, when he referred Galperin to Bookhart. However, in respondent's favor, respondent later refused to review a retainer agreement between Galperin and Bookhart, when requested to do so by Galperin, because of his prior representation of Bookhart. Instead, he directed Galperin to seek other counsel.

The record discloses that Galperin did hire Bookhart as a "mortgage broker," and paid him \$2,500 as a "brokerage" fee. This total amount was paid by way of four separate checks (Exhibit P-4). Thereafter, Bookhart provided to Galperin what has been marked as Exhibit P-5. That document is a letter from Synergy Mortgage Corporation, dated July 6, 1992 and signed by a J. Baylor Williams, whose title was allegedly that of Vice-President of the Commercial Loan Department of Synergy. In that letter, Galperin was advised that his loan request for \$350,000 had been approved, at an interest rate of nine percent, for a term of fifteen years. Williams promised a formal commitment within "a day or two." Bookhart had allegedly advised Galperin that the formal commitment would be picked up by Bookhart, upon delivery of Galperin's final payment to him on July 25, 1992. In fact, however, the formal commitment was never issued. Thereafter, Galperin was unable to

contact Bookhart. Messages left on Bookhart's answering machine were never returned.

In an effort to obtain information regarding Bookhart's whereabouts and how to reach him, Galperin contacted respondent. Beginning in early August 1992, respondent advised Galperin that Bookhart was then in Europe on business. Throughout the numerous telephone calls that followed during the month of August, respondent continued to advise Galperin that Bookhart was in Europe on business. Respondent further advised Galperin that Bookhart "called in" on occasion because he was moving around so much. Galperin testified that, during the period of August 24th through August 31st, while he was on vacation in Martha's Vineyard, he called respondent in New Jersey three to four times a day to ascertain the status of his loan. At that point, respondent advised him that Bookhart's associates were handling the matter and that he should not be concerned.

Shortly thereafter, Galperin called Synergy Mortgage Company and was advised that the letter forwarded from Williams was fraudulent. In fact, Williams did not work for Synergy in any permanent capacity.

Respondent testified that, once he received a copy of the "commitment letter" from Synergy, dated July 6, 1992, he immediately ordered title searches and other documents. He testified that he believed Bookhart's representation that the formal commitment would soon be issued. In addition, he advised all attorneys involved in the two matters that the mortgage was

forthcoming. As a result, a scheduled sheriff's sale on one of the properties was thereafter adjourned, according to respondent. Contrary to Galperin's testimony, respondent testified initially that Galperin actually advised him, at the beginning of August, that the mortgage commitment was invalid.

With regard to Bookhart's whereabouts, respondent testified that he learned, in early August, that Bookhart was sent to a federal prison in New York. He learned more details from Bookhart's New York attorney at the end of August. By letter dated August 7, 1992, respondent wrote to the judge who was presiding over Bookhart's New Jersey criminal matter, to advise him that Bookhart was then in prison in New York.

Although respondent claimed that Galperin informed him that the mortgage commitment was invalid in early August, he did not tell Galperin that Bookhart was in prison when Galperin inquired of his whereabouts. His reason for that action was that "it just didn't look right - the whole situation with Mr. Galperin and Mr. Bookhart" (T75).

Although respondent now admits that it was a mistake not to tell Galperin about Bookhart's incarceration, respondent contended that, rather than tell Galperin the truth, he continued to try to find a mortgage source for Galperin. Respondent neither denied telling Galperin that Bookhart was then in Europe on business nor disputed Galperin's recollection that he called daily, and as much as three or four times a day, while on vacation in Martha's Vineyard during the last week in August. Throughout this period,

Galperin believed that the mortgage commitment was valid and that Bookhart or "Bookhart's associates" were pursuing the matter. Respondent admitted that, during this entire period, he continued to represent Bookhart on issues related to his New Jersey criminal conviction, including probation and restitution arrangements.

When Galperin ultimately discovered that the commitment letter received from Williams, which purported to be a commitment from Synergy Mortgage Company, was, in fact, a fraud, Galperin filed a criminal complaint for theft by deception against Bookhart in Wood-Ridge, New Jersey. That complaint was thereafter investigated by Lieutenant Valdez of the Wood-Ridge Police Department. As part of Valdez's investigation, he interviewed respondent, in September 1992, to determine Bookhart's whereabouts. At that time, respondent informed Valdez that Bookhart was "in New York on vacation." When confronted, at the DEC hearing, with Valdez's testimony concerning that misrepresentation, respondent testified that he "may very well" have told Valdez that Bookhart was on vacation in New York. He indicated that that period time of time was "just a blur" to him because of problems with his own matrimonial matter. Respondent testified that he was then a sole practitioner without any office help whatsoever — his soon-to-be ex-wife had been his secretary until the time of the matrimonial difficulties — and that he was then in the middle of his own divorce, proceeding pro se, having determined that he could no longer afford representation by another counsel.

Following receipt of information from another source that Bookhart was, in fact, incarcerated in New York, Valdez filed this ethnics grievance.

There is no inference in the record that respondent profited in any way from his referral of Galperin to Bookhart. To the contrary, the record indicates that Galperin was in somewhat desperate financial straits (whether or not he admits to that fact in his testimony before the DEC) and that there were very few sources from which he could expect to obtain the necessary funding. In fact, as revealed in his testimony, Galperin subsequently lost the properties in question because he was unable to obtain funding from another source.

The DEC concluded that respondent violated RPC 1.4(a) by his failure to keep his client, Galperin, reasonably informed of the status of the matter and to promptly comply with Galperin's reasonable requests for information. In addition, the DEC found that respondent's representation of Galperin in his refinancing efforts violated RPC 1.7(b) because those efforts were limited, to a material degree, by his conflicting responsibilities to his other client, Bookhart. Similarly, the DEC found that respondent failed to exercise independent professional judgment and to render candid advice to his client, Galperin, in violation of RPC 2.1. Moreover, the DEC found violations of RPC 4.1(a), in that respondent made false representations of a material fact to Galperin as well as to Valdez, and further failed to disclose material facts to third persons (the DEC failed to specify the third person involved,

although it appears that the reference is to Valdez). Finally, the DEC found that respondent engaged in misrepresentation and dishonesty, in violation of RPC 8.4(c). Although not specified in the record, it may be inferred that the DEC determined that the misrepresentation and dishonesty extended both to Galperin and to Valdez.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusion of the DEC that respondent acted unethically is supported by clear and convincing evidence.

Respondent's actions with regard to his client, Marc Galperin, were improper in a number of respects. For whatever reason, respondent failed to advise Galperin of Bookhart's actual whereabouts by repeatedly telling Galperin that Bookhart was in Europe, all the while knowing that he was, in fact, incarcerated in New York. Respondent further failed to advise Galperin that the funds allegedly committed by Synergy Mortgage Company would not be forthcoming. Both actions constituted violations of RPC 1.4(a), in that he failed to keep Galperin reasonably informed of the loan status and of Bookhart's actual whereabouts. Respondent's actions, however, went beyond failure to communicate. On numerous occasions, respondent actively misrepresented both Bookhart's whereabouts and the status of the mortgage commitment, which, he reassured Galperin, was being actively pursued by Bookhart's associates. These misrepresentations violated RPC 8.4(c).

Respondent's defense that he did not tell Galperin the truth regarding Bookhart's whereabouts because the situation "didn't look right" is certainly no excuse. His conduct in continuing to mislead Galperin as to the alleged validity of the mortgage commitment is not justified by his claim, unsupported by any documentation, that he continued to try to locate a mortgage source for Galperin.

The Board further concurs with the DEC's conclusion that respondent's misrepresentation to Police Officer Valdez violated RPC 8.4(c). The Board finds that this misrepresentation, made as it was to a police officer conducting an official investigation, also constituted conduct prejudicial to the administration of justice, in direct violation of RPC 8.4(d).

The remaining violations found by the DEC are not, in the Board's view, supported by clear and convincing evidence. RPC 1.7(b) prohibits representation of a client where that representation would limit the attorney's responsibility to another client. Here, respondent represented Galperin and Bookhart in totally separate transactions. Although he did arrange for Galperin and Bookhart to meet, he did not represent either party in the mortgage brokerage deal. In fact, when approached by Galperin to review his agreement with Bookhart, respondent refused to handle the matter and directed Galperin to seek other counsel.

Similarly, the Board is unable to find a violation of RPC 2.1 by the requisite standard of clear and convincing. RPC 2.1 requires that, in representing a client, the lawyer must exercise

independent professional judgment and render candid advice. The Board does not find sufficient support in this record for a finding of a violation of this rule by clear and convincing evidence.

Respondent's ethics violations are numerous. He engaged in a series of misrepresentations to his client and, thereafter, lied to a police officer. RPC 1.4(a), RPC 8.4(c) and RPC 8.4(d) are all implicated. Under these circumstances, public discipline is mandated. See, e.g., In re Farr, 115 N.J. 231 (1989) (where the attorney was suspended for six months for serious misconduct while serving as an assistant prosecutor, which misconduct included lying to the Attorney General's Office during the course of an official investigation, by denying his use and possession of controlled dangerous substances).

In determining the appropriate discipline to be imposed, the Board has considered numerous mitigating factors, including respondent's prior unblemished record, and the fact that he was not motivated by personal benefit but, rather, by his concern with his client's plight. Indeed, the referral to Bookhart was clearly a last gasp effort to gain financing to meet the terms of the settlement in order to rescue Galperin from his financial difficulties. The Board has also considered that, at the time of this misconduct, respondent was representing himself in his own divorce action. This divorce matter caused him both personal and business difficulties since, until their separation, respondent's spouse provided respondent's only secretarial assistance. No one was hired to replace her. In addition, although respondent spent

a significant amount of time on the Galperin matter, he did so with little or no hope of financial compensation for his efforts.

Given all of these factors, the Board is unanimous in its recommendation that respondent be suspended for a period of three months. Three members did not participate.

The Board further recommends that respondent be required to reimburse the EFC for administrative costs.

Dated:

7/28/94

By:



Raymond R. Trombadore
Chair
Disciplinary Review Board