SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-110

IN THE MATTER OF :
:
KEVIN E. GILES, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 23, 1993

Decided: December 13, 1993

David Schechner 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 upon a recommendation for public discipline filed by the District VB Ethics Committee (DEC). The formal complaints, arising from five matters, 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 (failure to communicate), RPC 1.5 (unreasonable fee), RPC 7.1(a) and (b) (erroneously cited as RPC 7.1(a)(c) in complaint) (communication regarding the attorney's service), RPC 8.1(b) (failure to cooperate with the disciplinary system), RPC 8.4(c) (misrepresentation; withdrawn by the presenter), RPC 8.4(d) (conduct prejudicial to the administration of justice) and R.1:21-1(a) (failure to maintain a bona fide office.) Respondent did not appear at the DEC hearing.

The DEC recommended dismissal in a sixth matter, McClish (District Docket No. VB-91-45E), which was not heard by the DEC. During the DEC hearing, the panel indicated that the matter would be adjourned rather than dismissed, as stated in the report (T126).[1]

Respondent was admitted to the practice of law in New Jersey in 1983 and maintained an office in East Orange, Essex County. On September 28, 1988, respondent was privately reprimanded for lack of diligence, misrepresentation and failure to cooperate with the DEC. In addition, he was placed on Disability Inactive Status (DIS) by order dated April 30, 1991. The order arose from a motion for temporary suspension filed by the Office of Attorney Ethics (OAE). By order dated July 26, 1991, respondent's status on DIS was continued. Respondent was transferred from DIS and suspended for one year on January 26, 1993, based on findings of gross neglect, pattern of neglect, failure to communicate, abandonment of clients, failure to return client property, lack of diligence, failure to cooperate with disciplinary authorities and failure to maintain a bona fide office.

The Bobien Matter (District Docket No. VB-91-66E)

In May 1990, Josephine Bobien retained respondent to represent her in municipal court in connection with the alleged theft of her furniture. Bobien paid respondent $250. Bobien received notice to appear at the Orange Municipal Court. She contacted respondent, who indicated that he would attend (T21-22). In or about August

[1] T refers to the transcript of the hearing before the DEC on June 16, 1992.

1990, Bobien appeared in court. Respondent failed to appear and the matter was adjourned. Approximately one month later, Bobien received notice to appear a second time. She personally showed the letter to respondent. He indicated that he would be there (T23-24). Bobien appeared in court and, again, respondent failed to appear. According to Bobien's testimony, court personnel telephoned respondent, who stated that he was unable to appear and asked that the municipal prosecutor represent Bobien (T14). Bobien was also able to discuss the matter with respondent at that time (T25). Despite the prosecutor's attempt to represent Bobien, the judge dismissed the matter, apparently based on respondent's failure to timely subpoena witnesses (T14). Thereafter, Bobien attempted to contact respondent every day and was only able to reach his secretary (T25-26).

Throughout the period that respondent represented her, Bobien attempted to contact respondent on numerous occasions by telephone and in person. According to her testimony, she was consistently informed by his staff that he was not in his office (T7, 12).

After the dismissal of her complaint, Bobien filed for fee arbitration, seeking the return of her $250. Thereafter, Bobien received a letter, apparently written by a member of respondent's office staff, dated December 19, 1990, offering her $100 as settlement of the fee arbitration matter, which she refused to accept (T15). The fee arbitration hearing took place on March 21, 1991. Respondent did not attend the hearing or file a response. The fee arbitration committee determined that respondent should

refund the $250 Bobien paid him. Thereafter, respondent failed to contact Bobien and failed to comply with the fee arbitration determination.

The presenter in the ethics matter, David Schechner, Esq., requested information from respondent regarding Bobien's allegations. Respondent failed to reply to Schechner's requests for information.

A formal complaint was filed charging respondent with violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b), RPC 8.4(d) and R.1:21-1(a).

Prior to the DEC's deliberations on this count, the presenter admitted that he had not produced proof of respondent's failure to maintain a bona fide office, in violation of R.1:21-1(a). Further, the presenter withdrew the allegation of violation of RPC 1.1(a).

The DEC determined that respondent had violated RPC 1.1(a) (although the presenter had withdrawn that charge), RPC 1.3, RPC 1.4, RPC 8.1(b) and RPC 8.4(d). Further, the DEC determined that this matter, considered with the Robinson matter below and with matters previously heard by the DEC under docket numbers VB-89-16E, VB-90-02E and VB-90-19E (considered by the Board under docket numbers DRB 92-100 and 92-101, which resulted in respondent's one-year suspension) established a pattern of neglect, in violation of RPC 1.1(b).

The Robinson Matter (District Docket No. VB-90-43E)

In late 1987, respondent was retained by John C. Robinson, Betty J. Robinson and Evangeline D. Daniels, executors of the estate of Frances K. Robinson, who passed away on July 9, 1987, to handle certain matters in connection with the estate. The decedent's will was probated (T29). Under the terms of the will, John C. Robinson, decedent's husband, was the sole beneficiary of the estate (T30). Respondent was requested to prepare a deed from the estate to John C. Robinson, for a piece of property that had been owned by the decedent. Respondent was paid $150. Despite several requests for information about the deed, respondent never prepared it (T31).

A contract for the sale of the property in question was signed, in May 1989, between the decedent's estate, as seller, and Wesley Sumpter, Jr. and Ida R. Sumpter, his wife, as buyers. Respondent was paid $850 to represent the estate at closing. The Sumpters retained Melvin A. Jacobs, Esq., to represent them. The purchase price of the property was $55,000 and the contract called for the closing of title to take place on July 15, 1989. After pressure was brought to bear on respondent by Jacobs and the Robinsons, closing took place on December 18, 1989. A Uniform Settlement Statement was prepared and executed by the parties. However, no funds were delivered to the Robinsons because the transfer inheritance tax form had not been filed and a waiver had not been secured. In addition, there were outstanding water and sewer bills and mortgages that had not been canceled of record.

The closing proceeds were paid to respondent on the closing date and placed in his trust account. According to the closing statement, the Robinsons should have received $49,690.99. In addition, they should have received the amount returned from the water bill escrow that was created on the date of closing. Although the water escrow matter was resolved shortly after the closing, the balance owed to the Robinsons was not paid due to Jacobs' inability to obtain respondent's cooperation in securing the necessary documents and Jacob's concern that his clients might be forced to pay the sum twice. The Robinsons made numerous unsuccessful attempts to contact respondent to obtain their funds, including scheduling four meetings at which respondent failed to appear (T44).

Respondent filed the transfer inheritance tax return on May 21, 1990. However, the form was not properly filled out and, in fact, the real estate is not mentioned in the return (T64). As noted in the complaint (Exhibit P-8), although a tax waiver was not necessary, respondent promised to obtain one and then failed to do so.

The Robinsons filed a grievance with the DEC that led to a demand audit of respondent's attorney books and records on February 15, 1991. The OAE ordered respondent to turn over the Robinson funds within forty-five days. He failed to comply with that direction. Thereafter, on April 22, 1991, prior to respondent's April 30, 1991 transfer to Disability Inactive Status, the OAE filed a petition for emergent relief with the Court, as a result of

which respondent's trust funds were seized. The Robinsons ultimately filed a claim with the Lawyers' Fund for Client Protection and received $47,390.99 from respondent's previously seized trust funds on January 10, 1992 (T48, Exhibit P-9) (the original amount due at closing was apparently reduced by expenditures for repairs to the property (T57)). The Robinsons did not receive any interest on the funds for the time respondent improperly held them (T51-52). In addition, according to testimony offered by John C. Robinson's daughter, an IRS assessment indicated that the Robinsons had received the funds in 1989. As of the date of the DEC hearing, an accountant was attempting to resolve the matter (T51).

In addition to the above, respondent failed to comply with numerous requests for information from the investigator/presenter. The formal complaint charged respondent with violations of RPC 1.1(a) and (b), RPC 1.4, RPC 1.5, RPC 7.1(a) and (b), RPC 8.1(b) and RPC 8.4(d). In addition, the complaint stated that the presenter could not be certain that the Robinsons' funds were on deposit. Therefore, respondent was also charged with a violation of RPC 8.4(c). However, it appears that the funds were properly safeguarded by respondent. Accordingly, at the DEC hearing, the presenter withdrew the allegation of violation of RPC 8.4(c) (T72).

The DEC determined that respondent violated RPC 1.1 (a) and (b) — when this matter is combined with Bobien and the cases previously considered by the Board — RPC 1.4, RPC 7.1(a) and (b), RPC 8.1(b) (the transcript of the panel's determination mistakenly

refers to RPC 8.1(d) (T78)) for both his failure to respond to the investigator and to the OAE and RPC 8.4(d). In addition, the DEC found that, with regard to the alleged violation of RPC 1.5, the fee respondent charged the Robinsons would have been reasonable if he had actually performed the services for which he was retained. However, since he did not perform the services, the fee was unreasonable and violated RPC 1.5.

The Harvey Matter (District Docket No. VB-91-36E)

In May 1988, Miriam Harvey retained respondent to represent her in connection with a matrimonial matter. Respondent was also retained to represent Harvey in connection with a potential lawsuit stemming from the forgery of her signature on a mortgage note. Respondent was paid approximately $750 toward his fee (T87).

According to Harvey, she was aware of one letter that respondent wrote in her behalf in connection with the forgery matter (T101). Respondent pursued the matrimonial matter, although he was occasionally dilatory and not as communicative with Harvey as he should have been. According to Harvey's testimony, at one point another attorney in respondent's office was handling the matter in her behalf (T91). A complaint was filed and served on Mr. Harvey; subsequently a request to enter default and a certification of default were filed with the clerk of the court. On March 1, 1990, Harvey's suit was dismissed for lack of prosecution. The dismissal was apparently entered due to respondent's failure to communicate with the court in a timely

manner. For unexplained reasons, respondent failed to have the dismissal vacated, failed to take any further action in Harvey's behalf, failed to advise Harvey of the dismissal and failed to respond to her requests for information. Harvey became concerned over the length of time the divorce was taking and, unable to reach respondent, telephoned the court. The judge informed her that the matter had been dismissed (T93-94, 100).

Harvey went to respondent's office several times during normal business hours and found it locked. On one occasion, she found a note indicating where respondent could be located (T106-107). Eventually, Harvey was able to obtain her file from an unidentified individual at that location. Exhibit P-8 in the Robinson matter, reveals that respondent had, in fact, been locked out of his office for non-payment of rent.

Harvey retained another attorney to represent her in the forgery and matrimonial matters, both of which were being pursued to her satisfaction as of the date of the DEC hearing (T86-87).

In addition to the above, respondent failed to reply to the DEC investigator's requests for information. The complaint charged respondent with violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b) and RPC 8.4(d).

The DEC found violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b) (the transcript of the panel decision mistakenly refers to RPC 1.1(b)), and RPC 8.4(d)

The Gordon Matter (District Docket No. VB-91-48E)

Ceasar Gordon retained respondent to represent him in connection with injuries suffered when he was struck by a bus operated by the Irvington Board of Education, on March 18, 1989. Respondent was retained within one month following the accident (T114). Gordon did not pay respondent a fee when he was retained. Although respondent did some work on Gordon's matter, he failed to file a tort claim notice with the Town of Irvington or the Irvington Board of Education, as required under N.J.S.A. 59:8-1 et seq.

From the beginning of the representation, despite numerous attempts by Gordon to contact respondent, he was unable to reach him. Further, when Gordon appeared for scheduled appointments with respondent, the latter was not present. During attempts to see respondent, Gordon found his office locked (T117). Gordon attempted to communicate with respondent's father, to no avail (T117). Gordon then retained another attorney who, unable to contact respondent, tried to communicate with respondent's father in an attempt to obtain Gordon's file (T118, Exhibit P-3B). Because of respondent's lack of cooperation in turning over the file, Gordon's substituted attorney has been unable to pursue the matter. Respondent also failed to communicate with the DEC investigator in his attempts to obtain information about Gordon's grievance.

The complaint charged respondent with violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b) and RPC 8.4(d).

The DEC found that respondent had violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b) and RPC 8.4(d).

The Mensah Matter (District Docket No. VB-91-43E)

The client in this matter, Margaret Mensah, did not testify before the DEC. Rather, testimony was offered by Maurice J. Donovan, Esq., of Wald and Del Vento, P.C., who later represented Mensah and filed the ethics grievance in her behalf.

On February 23, 1987, respondent was retained by Mensah to represent her in connection with a bus accident on February 18, 1987 and with a workers' compensation claim. It appears that respondent did file a complaint in Mensah's behalf in the civil matter, but never pursued the workers' compensation claim (T142). However, respondent then failed to properly pursue the civil case, which resulted in an order of dismissal entered on April 27, 1990, based upon respondent's failure to comply with a court order compelling discovery.

Because respondent failed to communicate with Mensah, she was unaware of the events taking place in her case. In February 1990, she retained the law firm of Wald and Del Vento to represent her. According to Donovan's testimony, Wald and Del Vento had great difficulty in securing Mensah's file from respondent. Mensah sent a letter to respondent dated February 26, 1990, requesting that the files in both of her matters be sent to Donovan's law firm. It appears that respondent then continued to work on the case, sending correspondence to opposing counsel on March 16 and 21, 1990,

enclosing interrogatories and authorization forms (Exhibits P-4 through P-6). Donovan testified that "after much back and forth some other letters, some telephone conversations," he received the file from respondent in mid-June 1990 (T139). Within that "back and forth" was a letter from respondent, dated April 16, 1990, requesting a $400 fee for work done on the file (Exhibit P-7). When Donovan requested that respondent substantiate the fee, respondent failed to reply (T140). Donovan also stated that he had difficulty in contacting respondent, whose telephone was disconnected, and that a certified letter had been returned to Donovan, unclaimed (T140-141). Donovan also testified that there was no direct contact with respondent but, rather, with respondent's secretary, who telephoned on one occasion in response to numerous messages (T143). When the file was ultimately returned, various significant documents were missing. In particular, respondent failed to include a substitution of attorney, which was not obtained by Wald and Del Vento until March 1991. Wald and Del Vento were able to have the civil matter reinstated (it has since been settled). The statute of limitations had, however, expired in the workers' compensation case (T144).

The complaint alleged that respondent violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 8.1(b) and R.1:21-1(a) (bona fide office).

The DEC determined that respondent violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4 and RPC 8.1(b) (the report mistakenly refers to RPC 1.1(b) (T161)).

In its report, the DEC recommended that "the most severe disciplinary action be taken against him so that these incidents will not be repeated by [respondent] in the future" (T162).

CONCLUSION AND RECOMMENDATION

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.

The DEC found that respondent was guilty of gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to cooperate with disciplinary authorities, charging an unreasonable fee and conduct prejudicial to the administration of justice. The last of these violations is most clearly seen in the Bobien matter, where respondent failed to appear in municipal court on more than one occasion, inconveniencing both opposing counsel and the court. According to the cover letter to the panel report, the DEC also found that respondent failed to maintain a bona fide office, in violation of R.1:21-1(a). This infraction was charged in two of the complaints and there is clear and convincing evidence of the violation in the record. The DEC did not provide specific details about a violation of RPC 7.1. It is not clear in the record to what the presenter was alluding, the DEC did not address the issue and the rule is not particularly applicable to the

situation. Accordingly, the Board does not find a violation of that rule.

Respondent is not a stranger to the disciplinary system. He was privately reprimanded, in 1988, for lack of diligence, misrepresentation and failure to cooperate with disciplinary authorities. In 1991, he was placed on DIS after a demand audit of his attorney books and records, which resulted from a claim that respondent had misappropriated funds. Although the audit revealed that respondent was not guilty of knowing or negligent misappropriation, he was instructed to correct deficiencies in his records. His failure to do so compelled the OAE to file a motion for his temporary suspension; that motion led to his being placed on DIS. Allegedly, respondent suffers from a "nervous disorder." On January 26, 1993, respondent was suspended for a period of one year for pattern of neglect, failure to communicate, abandonment of his clients, misrepresentations to and failure to cooperate with disciplinary authorities, and failure to maintain a bona fide office.

The misconduct that led to respondent's one-year suspension spanned a period from approximately September 1988 through approximately April 1990. In the matters now before the Board, respondent's misconduct spanned the time period from February 1987 through the date he was placed on DIS, April 30, 1991. Although he had not yet been disciplined at the time of the later misconduct, he at least was on notice, during some of that time, that his behavior was questionable. His failure to appear before the DEC in

these cases is a continuation of his earlier behavior, as represented by his failure to appear or to waive his appearance before the Board in the previous matters.

In the past, misconduct similar to respondent's has resulted in lengthy suspensions. An attorney was suspended for two years for gross neglect in four matters, lack of diligence, failure to communicate, pattern of neglect, failure to cooperate and failure to maintain a bona fide office. In re Mintz, 126 N.J. 484 (1992). See also In re Foley, 130 N.J. 47 (1992) (two-year suspension for gross neglect, pattern of neglect in three matters, lack of diligence, failure to expedite litigation, failure to communicate with and misrepresentation to a client and failure to cooperate with the disciplinary authorities. Foley had previously received a private and a public reprimand for similar misconduct); In re DePietropolo, 127 N.J. 237 (1992) (two-year suspension for, inter alia, pattern of neglect in five matters, misrepresentations to and failure to communicate with clients and failure to cooperate with disciplinary authorities); and In re Ackerman, 95 N.J. 147 (1984) (two-year suspension for a pattern of neglect and delay, lack of communication with clients, misrepresentation and failure to cooperate with the disciplinary system; the Court ordered that, prior to reinstatement, Ackerman prove his fitness to practice law. Ackerman had been previously publicly reprimanded).

In In re Getchius, 88 N.J. 269 (1982), the attorney was found guilty of neglect, failure to communicate, failure to act competently, misrepresentation of the status of cases and failure

to carry out contracts of employment in six matters. The Court held that a suspension of two years was the appropriate measure of discipline. The Court noted that "[t]he picture presented is not that of an isolated instance of aberrant behavior unlikely to be repeated. Respondent's conduct over a period of years has exhibited a 'pattern of negligence or neglect in his handling of legal matters'" (citation omitted). Id. at 276.

The same picture is present in the case currently before the Board, evidencing a consistent pattern of behavior by respondent. Further, unlike a majority of the attorneys in the above cases, respondent has a very significant prior disciplinary history, which must be considered as an aggravating factor warranting more than a two-year suspension.

More significantly, respondent abandoned his clients. Even if it is true that respondent's telephone was disconnected and that he was evicted from his office due to financial misfortune, he still had the responsibility to make himself available to his clients. Because respondent had to be aware of his financial difficulties, he knew or should have known that he would be evicted and, thus, had to take appropriate action to protect his clients' interests.

The Board is of the opinion that this matter is distinct from the above cited cases that led only to suspensions. At the Board hearing, respondent alluded, for the first time in these matters, to psychological and medical difficulties. There is no evidence of respondent's difficulties in the record developed by the DEC. Respondent informed the Board that he had been treated at the

Carrier Foundation for twenty-eight days, in the Spring of 1991, for drug/alcohol abuse, as well as stress/anxiety difficulties. At the Board hearing, respondent submitted his records from the Carrier Foundation. He explained that he is currently not receiving any treatment and that he now copes with his problems by being a born-again Christian. Respondent stated that, although he does not believe he is currently fit to practice, he does not want to lose his license.

However, during the Board hearing, the presenter noted that this was not the first time respondent had used these same excuses to explain his serious misconduct, including his repeated failure to cooperate with the DEC. Respondent's argument is similar to the one he made several years ago in connection with the prior disciplinary matters. Further, as the presenter recounted,

> . . . I have been the investigator in approximately somewhere between 15 and 20 matters involving [respondent]. . . .
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> [Respondent] who this is the second time I've seen was at one hearing many - - oh, several years ago in one of the cases, but has never appeared in answer to anything that's ever been sent to him, nor has he ever filed any answer to any of the matters.
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> [BT 2-3][2]

The Board also considered that the DEC hearing in these matters was held in June 1992, over a year after respondent's release from Carrier. Respondent cannot use his psychological/medical problems forever as an excuse for his indifference. Indeed, it is an excuse that the Board chooses to

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[2] BT refers to the transcript of the hearing before the Disciplinary Review Board on June 23, 1993.

disbelieve. It is telling that respondent has still not replied to the matters now before the DEC.

In the past, the Court has ordered disbarment for conduct similar to respondent's. An attorney who had been previously publicly reprimanded was disbarred for accepting retainers from fourteen clients over a three-year period without any intention of representing them. Further, the attorney lied to the court in order to excuse his failure to appear and failed to cooperate with the disciplinary authorities. In re Spagnoli, 115 N.J. 504 (1989). See also In re Harris, 131 N.J. 117 (1993) (where the attorney was disbarred for unethical conduct in ten matters, including gross neglect, failure to communicate, lack of diligence, conduct involving dishonesty, deceit or misrepresentation, failure to safeguard property of clients or third parties, abandonment of clients and failure to cooperate with the disciplinary authorities or to comply with orders of the Court).

In In re Cohen, 120 N.J. 304 (1990), Cohen was guilty of a pervasive pattern of neglect and lack of communication. Cohen also altered the filing date on a complaint in an attempt to deceive the court, his client and his adversaries. In determining that disbarment was appropriate, the Court noted Cohen's disciplinary history, which included a private reprimand and a one year suspension for misconduct in five separate matters. The Court remarked that "[r]espondent's continuous disregard of his clients, the courts, and the disciplinary system lead us to conclude that disbarment is the only appropriate discipline. We are unable to

conclude that respondent will improve his conduct" Id. at 308. Like Cohen, respondent is a recidivist who appears unable to conform his conduct to the standards expected of a member of his profession. Since his admission to the New Jersey bar in 1983, he has been found guilty of misconduct in nine matters, including gross neglect, lack of diligence, pattern of neglect, failure to communicate, failure to return client property, abandonment, misrepresentation, failure to maintain a bona fide office and failure to cooperate with disciplinary authorities. The additional numerous matters now pending before the DEC are, according to the presenter, "carbon copies" of respondent's previous misconduct (BT 16). Respondent's pervasive pattern of abandonment of his clients and his shocking indifference to their well-being are disturbing. Respondent is either unable or unwilling to cope with the responsibilities of the profession.

Mindful of the need to protect the public from an errant attorney, the Board, by a requisite majority, recommends that respondent be disbarred. Two members dissented, voting for a three-year suspension and proof of psychiatric fitness to practice law prior to reinstatement. One member did not participate.

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

Dated: 12/13/1993 By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board