SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-048

IN THE MATTER OF

LEON KNIGHT,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 24, 1993

Decided: May 24, 1993

Michael Kates appeared on behalf of the District VI Ethics Committee.
William R. Wood appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite receipt of 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 upon a recommendation for public discipline filed by the District VI Ethics Committee (DEC).

Respondent was admitted to the New Jersey bar in 1986 and maintains an office in Jersey City, Hudson County. He was suspended from the practice of law by order dated December 21, 1992, for failure to comply with a fee arbitration determination. He remains under suspension.

The DEC considered five matters, the facts of which are as follows:

The Vianna-Lopes Matter (District Docket No. VI-90-34E)

Respondent was retained in April 1988 by Alzirena Vianna and her husband Alexandre Lopes to obtain protected immigration status for Lopes. Vianna paid respondent $810 in two installments, both in April 1988. Although respondent's October 18, 1990 letter to the DEC investigator stated that he was retained primarily to determine if the couple qualified for amnesty, it is clear that he was retained to deal with Lopes' illegal alien status. Because Lopes' work visa had expired many months earlier, there was some urgency to address his situation.

Vianna was being represented by another attorney with regard to her own immigration status, at the time that she retained respondent. However, rather than have her attorney represent her husband, she retained respondent based upon information from a friend, Liamara Mariano, that respondent had indicated that he was able to obtain relief under a new program (1T 183).[1] Vianna was steadfast in her testimony that respondent misrepresented the results that he would be able to obtain on her husband's behalf:

> . . . He said my husband was not qualified for Amnesty program, but Immigration created a new law called Temporary Visa. My husband could work in the country six weeks, after he apply [sic] the papers at Immigration. After six weeks he will become legally [sic] eighteen months later he will become an American resident. [1T 159-160].

As the DEC noted, it is telling that, although Vianna was already represented by an attorney with whom she was satisfied, she

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[1] 1T refers to the transcript of the hearing before the DEC on February 7, 1992. 2T refers to the hearing on February 12, 1992. 3T refers to the hearing on February 28, 1992.

retained respondent to represent her husband. The DEC was of the opinion that she would not have retained respondent, but for his representation that he could obtain quick results under a new immigration program.

The presenter introduced the testimony of an expert in the field of immigration law, Maria Velez-Lopez, Esq. According to Velez-Lopez, in 1988 and 1989, there was no legal basis for an alien to obtain residency status within six weeks plus eighteen months after application to the Immigration and Naturalization Service (INS). Velez-Lopez explained that the only program offering a measure of protection was amnesty, which was not available to Lopes.

Respondent did not disagree with Velez-Lopez but, rather, denied that he had represented to Vianna that such a legal basis existed (1T 185).

Respondent was retained to process an application for Lopes. Although the DEC did not find that respondent had not performed any services in Lopes' behalf, no application was filed. In fact, respondent did not file any forms at all in Lopes' behalf. Vianna also testified about the difficulty she experienced in her numerous attempts to contact respondent. In addition, respondent misled Vianna regarding the status of the matter. According to her testimony, in response to her numerous inquiries about the progress of Lopes' application, respondent indicated that the INS was very busy and to give it more time, even though, as he admitted, he had never filed any documents on Lopes' behalf (1T 169, 200).

The Mariano Matter (District Docker No. VI-90-54E)

On or about March 31, 1988, Liamara Mariano and Carlos Henrique Mariano retained respondent to obtain protected immigration status in their behalf. Respondent was paid $1,620 in three installments. Mr. Mariano had been under a visitor's visa, which had expired. Mrs. Mariano worked as a housekeeper, but was dissatisfied with the position. Therefore, she did not wish to have her employer sponsor her, which could have extended the term of the employment.

According to Mrs. Mariano, respondent had assured her that he would obtain a work permit for her husband in six weeks. Respondent, in turn, testified that he was proceeding on a different theory, that is, sponsorship of Mrs. Mariano by a relative. Respondent provided no records to the DEC in support of this contention.

Mrs. Mariano's employer, who was anxious to confirm the status of the immigration application, asked respondent to provide the file number; respondent simply wrote a number on a slip of paper without consulting any file. According to an attorney consulted by Mrs. Mariano's employer, the number was incomplete (1T 232). Respondent explained that an employee had written the number (2T 93). Respondent was unable to produce the employee as a witness before the DEC; he also produced no evidence of attempts to locate and/or subpoena her. The DEC determined that the number was fabricated and constituted an attempt to mislead Mrs. Mariano as to the status of the application.

Although respondent did prepare certain forms in Mrs. Mariano's behalf, they were not legally sufficient to obtain a change in immigration status. As in the Vianna matter, there was, according to Velez-Lopez, no legal basis in 1988 and 1989 for an alien to obtain residency status in a period of six weeks plus eighteen months after application to the INS. The only program offering protection was amnesty, which was unavailable to Mr. Mariano. Respondent contended that he had never represented to the Marianos that he could obtain residency status in such a short period of time.

In a letter to Mrs. Mariano's employer dated July 5, 1988, respondent indicated that he had filed the aforementioned forms in April 1988. However, examination of the forms reveals that each is dated July 6, 1988. Respondent's explanation for the discrepancy was that his "letter to her was done without checking the file..." (2T 69). The DEC determined that the July 5, 1988 letter was a misrepresentation intended to conceal respondent's inaction in the matter. In its report, the DEC pointed to the "extraordinary efforts by the Committee to obtain the cooperation of respondent" (Panel Report at 19). The DEC noted that, in addition to the eight unsuccessful attempts made by the DEC Chair to contact respondent, it had taken eighty-two days for respondent to reply to the initial request for information (Panel Report at 19-20).

The Rogers Matter (District Docket No. VI-90-48E)

Respondent was retained by Horace L. Rogers to represent him and his wife in the purchase of real property. The price of the property was $94,500.00. First Financial Mortgage Corporation (FFMC) issued a mortgage commitment for $96,250.00.

Rogers and respondent did not review the closing figures prior to the closing. Respondent admitted that he erred in his belief that a life insurance premium payment of $3,524.50 (MIP) would not have to be paid by Rogers at the closing. In his answer, he admitted that he had failed to collect sufficient closing funds.

The DEC was unable to determine with certainty when respondent became aware that his clients would not have sufficient funds to close title. Respondent testified that, after the closing, he began calculating the expenses. It was then that he learned of the shortfall (1T 108). However, it was undisputed that Rogers' funds were insufficient. Prior to the closing, respondent had assured Rogers that he needed to have approximately $3,000. According to Rogers, respondent then informed him, immediately before the closing, that $6,000 was needed (2T 208). Still according to Rogers, he notified respondent that he did not have the additional funds to close title (2T 209). Respondent proceeded with the closing, allegedly unaware of the deficiency. He did not disclose the shortfall to the sellers' attorney until one week after the closing. The day after the closing, respondent contacted Rogers, who informed him that he would not be providing respondent with any further funds.

The complaint charged respondent with gross negligence in his handling of the closing, in that he failed to ascertain that the funds Rogers brought to the closing and the net mortgage proceeds were insufficient to satisfy the closing obligations. Although not finding that respondent knew of the shortfall at the time of the closing, the DEC noted several factual circumstances leading to a conclusion that respondent was indeed grossly negligent. The closing documents provided by the lending institution would have given an attorney acting competently notice of the shortfall. The mortgage instruction sheet (P-14) showed no deduction for the MIP payment. The lender's instruction sheet to respondent (P-18) listed charges not deducted from the net mortgage check and to be paid from the attorney's trust account. Among those listed was the MIP payment.

Respondent testified that, on two occasions prior to the closing, he spoke with a loan officer who told him that the MIP was "taken care of" (1T 137, 3T 23, 29). Based upon the loan officer's representation, he did not worry about the deficiency. Respondent failed to produce the loan officer as a witness.

Respondent also failed to complete a RESPA statement prior to the closing or at the closing, and did not fill out the line concerning cash needed from the buyer until after the closing.

The closing took place on June 1, 1990. The existing mortgage on the property was not paid off until June 21, 1990. Respondent testified that he sent a check to pay off the mortgage on June 1, 1990. He was later informed that the check was for an incorrect

amount. A check for the correct amount was sent on June 21, 1990 (3T 51-52). The deed and purchase money mortgage were not recorded until August 21, 1990. Respondent testified that he did not record these items to compel Rogers to provide the deficient funds. Respondent admitted during his testimony that this was "probably wrong" (1T 113). As of the date of the third hearing before the DEC, February 28, 1992, municipal property taxes, sewer and water charges and the title insurance premium remained unpaid. Nevertheless, respondent paid himself a $650 fee on June 9, 1990, even though, at that time, respondent knew that Rogers would not be providing additional funds.

On June 21, 1990, respondent disbursed $55,489.23 to pay off the mortgage. His trust account subsequently showed a negative balance. As a consequence of the resulting overdraft notification in August 1990, respondent's attorney books and records were audited. The audit was conducted on January 24, 1991. Respondent admitted to an OAE investigator that he did not keep a cash receipts or cash disbursements journal for his trust or business account and that he did not reconcile bank statements for both accounts to his checkbook or trust account ledger cards. The audit revealed that, because respondent deposited his own funds into the account, his records were in substantial compliance with the recordkeeping requirements.

Respondent was charged with inadequate recordkeeping. His answer asserted that the allegations had been addressed during the audit and that the ethics complaint placed him in double jeopardy.

The DEC noted that, although respondent was required to explain his recordkeeping and reconcile his accounts, the OAE made no representations to him that he could not be subsequently charged with recordkeeping violations.

The Diaz Matter (District Docket No. VI-91-13E)

This matter arose as a fee arbitration that resulted in a determination that respondent was obligated to return $1,000 to his former client. The fee arbitration committee referred the matter to the DEC for investigation. In May 1988, Inez Diaz retained respondent to pursue an immigration matter in her behalf, paying him $1,000. Respondent advised Diaz that he would obtain a "green card" for her by the end of 1988. In 1989, respondent sent Diaz for a physical examination at an additional expense to her. The examination was unnecessary and was a delaying tactic employed by respondent. Respondent took no action in Diaz' behalf.

By letter dated May 20, 1991, respondent was sent a copy of the Diaz grievance and asked to respond. The return receipt card indicates that respondent received the letter on May 21, 1991. A second request for information was sent to respondent on June 17, 1991. A subpoena was served upon respondent on July 26, 1991, compelling his appearance and the production of the Diaz file. Respondent did not reply to any of the requests for information. The complaint was mailed to respondent on October 23, 1991, by certified mail, return receipt requested. The return receipt was not produced and respondent denied receiving the complaint.

Respondent did not file an answer. The DEC concluded that respondent had received actual notice of the investigation, and determined to proceed on the basis that respondent was in default due to his failure to file an answer to the ethics complaint. Respondent was not allowed to cross-examine Diaz or testify on his own behalf in this matter.

R.1:20-3(i) requires that an attorney file an answer within ten days after receipt of the complaint. Respondent failed to do so. There is no rule that specifically grants the DEC the power to find a respondent in default in an ethics proceeding. During the Board hearing, the panel chair, who was acting as presenter before the Board, admitted that there was no legal authority to support that proposition.

The OAE Matter (District Docket No. XIV-91-12E)

The OAE initiated an inquiry into the June 28, 1990 dishonor of respondent's trust account check (see discussion, supra). Written notice thereof was sent to respondent on August 9, 1990, via regular mail. When no response was received, a second notice was sent on September 7, 1990, via certified mail, return receipt requested. Respondent acknowledged receipt of the second letter. Although respondent admitted the authenticity of his signature on the green certified return card, dated September 14, 1990, he questioned whether the receipt corresponded to the September 7, 1990 letter. The DEC found this argument to be without merit. There was no testimony offered as to any other correspondence sent

to respondent by the OAE in or about the same time period. In addition, respondent admitted having seen the letter in question. Both letters to respondent requested a written and documented explanation of the trust account overdraft. Respondent failed to reply to the OAE. Accordingly, an OAE investigator, Jeanine Verdel, attempted to contact respondent. Verdel testified that she had telephoned respondent's office, having left messages with his secretary or on an answering machine on three occasions, before respondent returned her call on October 3, 1990 (1T 28). During the October 3 conversation, respondent informed Verdel that the overdraft had resulted from a real estate closing in which his client had failed to provide sufficient funds. Verdel informed respondent that it was still necessary for him to furnish a written and documented explanation for the overdraft to the OAE.

Despite Verdel's instruction, respondent failed to submit an explanation to the OAE. Verdel again attempted to contact respondent, leaving messages on October 12, October 15, October 17, October 23 and November 2, 1990. Respondent did not return her calls. Verdel finally reached respondent on November 7, 1990. Respondent advised Verdel that he was having difficulty providing a written response because his file in the underlying matter (Rogers) had been delivered to the DEC investigator. Verdel granted respondent an additional ten days to supply a written and documented explanation for the overdraft. Thereafter, as a result of respondent's failure to comply with Verdel's request, the OAE sent a letter on December 3, 1990 to his post office box, by

regular mail. The letter directed that respondent provide certain specific documents by December 14, 1990. The letter further warned that the failure to produce the documents would result in a demand audit of respondent's trust account. Respondent denied receipt of the letter. Respondent's non-compliance with the directives of that letter led to a demand audit, scheduled for January 14, 1991 at 10:00 A.M. Notice of the audit was sent to respondent's post office box via certified mail, return receipt requested, and regular mail, on December 21, 1990.

The next communication between the OAE and respondent occurred on January 11, 1991, when Verdel telephoned him to confirm his intent to appear for the audit. During that conversation, respondent inquired about the possibility of an adjournment because of a schedule conflict. Although respondent disputed her testimony, Verdel testified that at no time did she inform respondent that the audit had been adjourned. The DEC agreed, concluding that no one had represented to respondent that the audit had been adjourned. Respondent failed to appear on January 14, 1991; he telephoned Verdel during her lunch hour. Although he left a message that he would telephone her again that afternoon, he failed to do so. The DEC found it significant that, although respondent allegedly had a schedule conflict, he presented no evidence in this regard and, that, in fact, the January 11 telephone contact had been initiated by Verdel.

On January 22, 1991, as a result of respondent's failure to appear for the demand audit, the OAE filed an emergent application

for respondent's temporary suspension from the practice of law. On January 23, 1991, the OAE received a letter from respondent apologizing for his non-appearance and requesting that the audit be rescheduled. The audit was rescheduled for January 24, 1991. As a result of respondent's appearance on that date, the OAE's application for respondent's suspension was withdrawn. After three interviews with OAE staff, respondent ultimately provided a written explanation for the overdraft. The OAE concluded that respondent had taken necessary steps to bring his accounts into substantial compliance with the recordkeeping requirements of R.1:21-6.

* * *

The complaint in the OAE matter was sent to respondent on April 12, 1991, via certified mail, return receipt requested. The return receipt bears what appears to be respondent's signature, although respondent disputed its authenticity (1T 9). Respondent admitted that he failed to file an answer to the complaint.

Respondent contended that he failed to reply to the OAE's requests for information because he believed that he had already provided a response to the DEC investigator in connection with the Rogers matter. The DEC found that Verdel's testimony was clear that she had informed respondent that, despite his reply to the DEC, he was required to provide an independent written response to the OAE.

The second count of the OAE's complaint charged respondent with misrepresentation in connection with the Rogers closing. Essentially, the complaint charged that, although respondent was

aware, at the time of the closing, that he had insufficient funds to pay the closing obligations, he nevertheless failed to disclose that information to his own clients or to the sellers' attorney.

As discussed in the Rogers matter, supra, respondent argued that he was unaware at the time of closing of the shortfall. The DEC noted that, even assuming that respondent was aware of the shortfall, he had proceeded with the reasonable expectation that his client would provide the deficiency after the closing.

* * *

The DEC determined that, in the Vianna-Lopes, Mariano and Diaz matters, respondent violated RPC 8.4(c) (conduct involving fraud, dishonesty or misrepresentation), in that he misrepresented to his clients the availability of relief and the status of their petitions with the INS. The DEC also determined that, in two of those matters, Mariano and Diaz, respondent violated RPC 8.1(b), in that he did not cooperate with the DEC's requests for information. Respondent was also charged, in each of these three matters, with a violation of RPC 3.1 (asserting a non-meritorious claim before a tribunal). The DEC did not find a violation in that regard in any of the three matters, because respondent did not actually file a claim.

In the Rogers matter, the DEC determined that respondent had violated RPC 1.1(a) (gross negligence). Although the DEC was unable to conclude that respondent knew of the shortfall at the time of the closing, it found that his conduct in connection with

the closing had been grossly negligent. The DEC pointed out that the documents respondent had in his possession at the time of the closing gave clear notice that the MIP premium was due. Although respondent testified that he had been told by a loan officer that the payment was "taken care of", he produced no evidence in that regard. He further failed to complete the RESPA statement prior to the closing and, in fact, admitted in his answer that he had collected insufficient funds. Because of the shortfall, respondent did not make certain payments that should have been made out of the closing proceeds. As noted by the DEC,

> [a]s a result of having insufficient funds, respondent failed to pay off the underlying mortgage in a timely fashion. The closing took place on June 1, 1990; the mortgage was paid off on June 21, 1990, as shown by the date of the transmittal letter (**P-23**) and respondent's reconstructed disbursement ledger (**P-48**). Municipal property taxes were not paid from the closing proceeds and the title insurance premium was similarly not paid. See **P-47** which is a reconstruction of paid and unpaid items, at least through the date of the last entry, August 21, 1990, when the deed and purchase money mortgage were finally recorded by respondent. As at [sic] the third hearing date on February 28, 1992, municipal property taxes, sewer and water charges and the title insurance premium were unpaid. **3T:145-19 to 146-22.** Interestingly enough, respondent made sure to pay himself for his legal services early on, from trust funds that should [sic] have known at the time were deficient to pay other expenses. The disbursement took place on June 9, 1990, when he paid himself $650 (**P-48**). [Footnote omitted].
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> [Panel Report at 25].

In the Rogers matter, respondent was also charged with violating RPC 1.15(b) (failure to release property to a client or third party). (As the DEC noted, the complaint mistakenly refers to RPC 1.15(d).) The DEC determined that this rule had not been violated. The rule presumes that the attorney has possession of

the property as a prerequisite to a violation of that section. In this case, respondent did not receive sufficient funds from his client and, therefore, had nothing to release either to his client or to a third party.

In addition, in the Rogers matter, respondent was charged with violating R.1:21-6(b)(2), (b)(9) and (c), in that his attorney books and records were inadequate. Respondent argued that this charge placed him in double jeopardy because the issue of his recordkeeping had already been examined by the OAE during his audit. The DEC determined that his objection in this regard was without merit. The DEC found that respondent had failed to maintain and make available for audit proper trust account records.

In the OAE matter, respondent failed to cooperate with the OAE's overdraft inquiry. The DEC noted his "dilatory tactics" in responding to Verdel's telephone calls and his unexcused non-appearance at the demand audit on January 14, 1991. Accordingly, the DEC found that respondent violated RPC 8.1(b). In addition, the complaint was amended on the first hearing date to charge respondent with failure to file an answer to the complaint, also in violation of RPC 8.1(b). The DEC determined that respondent was guilty of that violation. Although respondent denied receipt of the OAE's April 12, 1991 letter enclosing the complaint, he admitted having received the complaint during the course of the investigation (1T 9). The DEC also noted that respondent did file an answer to another complaint (Exhibit R-1), demonstrating his understanding of the requirement that he file an answer.

The second count of the OAE's complaint charged respondent with misrepresentation in connection with the closing in the Rogers matter, in violation of RPC 8.4(c). The DEC was unable to find, based on the record before it, that respondent had actual knowledge of the shortfall at the time of closing. Accordingly, there was no finding that "the act of closing was a fraud or deceit perpetrated upon third parties" (Panel Report at 38). The DEC noted, however, that respondent should not have removed his own fee prior to paying other obligations.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent is guilty of unethical conduct is supported by clear and convincing evidence.

In the Vianna-Lopes, Mariano and Diaz matters, respondent misrepresented to his clients what he could accomplish for them in their immigration matters. The Board agrees with the DEC that respondent represented to the grievants that he would achieve results for them that their own attorneys could not.

In the Rogers matter, respondent handled a real estate closing without adequately reviewing the closing documents and also failed to collect sufficient funds from his client. His conduct in this regard was similar to that displayed by the attorney in In re Kasdan, 115 N.J. 472 (1989). There, the attorney represented clients in connection with their purchase of real property. She

conducted the closing of the title without collecting the necessary funds from them. Although the DEC found Kasdan guilty of misrepresentation, the Board and the Court disagreed, finding, instead, gross neglect. Kasdan was suspended for three months based on her misconduct in that matter as well as other serious misconduct, balanced against extensive mitigating factors.

In Rogers, respondent, like Kasdan, neglected his duty not only to his own clients, but to the bank that advanced the purchase funds as well. The Board has concluded however, based upon insufficient evidence of an intent to deceive, that there was no misrepresentation to the bank in the Rogers matter.

In addition, also in the Rogers matter, respondent is guilty of violations of R.1:21-6(b)(2), (b)(9) and (c). Respondent admitted to the OAE investigator that he did not maintain a cash receipts or disbursements journal for his trust or business account, and that he did not reconcile bank statements on both accounts to his checkbook or trust ledger cards (3T 71, Panel Report at 27).

In In re Fucetola, 101 N.J. 5 (1985), the attorney was publicly reprimanded for recordkeeping violations. He had been previously privately reprimanded. Fucetola admitted his derelictions and stipulated to the facts alleged against him. In contrast to Fucetola, respondent did not readily admit his misconduct or cooperate with the OAE. Indeed, as seen in the OAE matter, herculean efforts were undertaken to communicate with respondent. Respondent's non-cooperation was so egregious that the

OAE was forced to file an emergent application with the Court for his suspension. Although the application was withdrawn when the OAE received a letter from respondent, his behavior was appalling. After three personal interviews with respondent, the OAE ultimately received a written explanation for the overdraft that had sparked the inquiry and concluded that respondent was in substantial compliance with the recordkeeping requirements. When this matter proceeded to the filing of a formal complaint, respondent failed to file an answer. See In re Fieschko, ___ N.J. ___ (1993) (where an attorney was publicly reprimanded for recordkeeping violations and failure to cooperate with the OAE), and in In re Henn, 121 N.J. 517 (1990) (where the attorney was publicly reprimanded for lack of diligence, misrepresentations to his clients and failure to keep them informed, recordkeeping violations and failure to cooperate with the disciplinary authorities).

The Board has concluded that this respondent's misconduct is far more egregious than Henn's, not only because of the number of clients involved, but also because of the extent of his disrespect for the disciplinary system. Respondent's demeanor toward the hearing panel defied belief. His obstreperous and belligerent behavior denigrated the dignity of the proceedings and approached conduct impeding the administration of justice. Respondent's behavior showed nothing short of indifference to his clients' interests, the disciplinary system and the legal profession at large. Although respondent subsequently apologized to the DEC and, arguably, his outbursts during the third hearing before the DEC may

have been sparked by tension and/or fatigue, his behavior throughout the proceedings was disturbing, beginning with his failure to respond to both the DEC's and the OAE's requests for information. Respondent's contumacious attitude toward the disciplinary system continued with his failure either to appear before the Board or to contact the Office of Board Counsel concerning his apparent decision not to appear.

In light of respondent's disciplinary history and the within misconduct, a six-month suspension is warranted. The Board unanimously so recommends. The Board further recommends that, prior to reinstatement, respondent submit psychiatric proof of his fitness to practice law. The Board also recommends that, upon reinstatement, respondent practice under the supervision of a proctor for two years. Additionally, the Board recommends that respondent's reinstatement be conditioned upon his compliance with the fee arbitration determination in In the Matter of Leon Knight, Docket No. DRB 92-395. One member did not participate.

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

Dated: 5/24/1993

By: Raymond R. Trombadore
Chair
Disciplinary Review Board