

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB. 95-056

IN THE MATTER OF :
 : :
EMIL T. RESTAINO : :
 : :
AN ATTORNEY AT LAW : :

Decision
of the
Disciplinary Review Board

Argued: April 19, 1995

Decided: August 11, 1995

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear, despite proper notice.

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 VA Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.15 (failure to account for trust funds and failure to comply with the recordkeeping provisions of R. 1:21-6); RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of neglect); RPC 1.3 (lack of diligence); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Respondent was admitted to the New Jersey bar in 1984. He was privately reprimanded on April 1, 1991 for failure to act with reasonable diligence, failure to keep his client informed, failure

to communicate the basis of his fee in writing, failure to promptly surrender his client's file to substituted counsel and failure to file an answer to the formal ethics complaint. One year later, on April 28, 1992, respondent was suspended from the practice of law for three months for misrepresentations to a client and for gross neglect, both in a real estate matter. Finally, after reinstatement, respondent failed to comply with a proctorship agreement, necessitating a motion for his temporary suspension. Respondent subsequently filed an overdue proctor's report and the motion was denied. However, the Court ordered that respondent pay a sanction in the amount of \$250. Respondent failed to pay that sanction and again failed to file proctorship reports, thereby necessitating a second motion for his temporary suspension. The Court denied that motion on the condition that respondent pay the previously ordered sanction on a payment schedule. The Court also ordered that respondent comply with the proctorship provisions under the supervision of a substitute proctor and that the proctorship continue until December 31, 1994 or until further order of the Court. The proctorship provisions continue to date.

* * *

On or about July 2, 1985, respondent was retained to draw the will of Joseph Catala. Catala died several days later, on July 5, 1985. Thereafter, respondent served as the attorney for the estate until he was suspended from the practice of law in April 1992,

except for a nine-month period during which respondent was employed as house counsel by a savings bank. It is not clear who, if anyone, handled the estate during that hiatus (May 1988 through January 1989).

At the time of his death, Catala was in the process of finalizing his divorce. His estate consisted of several small bank accounts amounting to approximately \$5,000 and an equitable distribution award in the amount of approximately \$75,000 plus interest. On or about July 8, 1986, while a member of the firm of Rudy, George and Restaino, respondent deposited into his trust account two checks totalling \$77,316.95, which represented Catala's share of the equitable distribution proceeds. Exhibit 6 (deposit slip). While at that firm, respondent billed the estate for over \$3,900, which apparently represented legal fees incurred during litigation involving a dispute over the divorce proceedings. While there is no claim that this was an improper billing, the fee was ultimately taken from the trust account and never recorded on the Catala client ledger card.

In or about December 1986, respondent left the firm of Rudy, George and Restaino and joined C. Robert Sarcone, P.A. He took the Catala estate file with him to that firm. On or about February 19, 1987, respondent transferred the Catala estate proceeds to the Sarcone trust account. However, that transfer amounted to only \$75,027.16 — almost \$2,300 less than the amount previously on deposit for the estate in the Rudy, George and Restaino trust account. Exhibit 7.

William Ruskowski, the Office of Attorney Ethics' (OAE) auditor assigned to the matter, testified that he was unable to determine the reason for the discrepancy between the amount originally on deposit to the credit of the Catala estate and the lesser amount deposited to the Sarcone firm account. This was so in spite of extensive efforts on his part to reconcile the discrepancy. Similarly, during the auditor's investigation, respondent was unable to account for the discrepancy due largely to the fact that he, admittedly, did not keep any records while those funds remained under his control. It is not clear whether respondent once kept records but discarded them prematurely or whether he never kept the records required by R. 1:21-6.

In an attempt to reconcile the discrepancy, at some point the OAE auditor prepared an analysis of the estate funds. Exhibit 12. Even after giving respondent every benefit of the doubt in terms of expenses allocated to the estate, the auditor still could not account for approximately \$680.42 in estate funds. However, because the necessary documentation was not available to him, he declined to characterize respondent's conduct as either negligent or knowing misappropriation. Indeed, it is not clear from the auditor's testimony that a shortage even existed. He seemed to suggest that there might be other legitimate expenses for which documentation was not provided. It is also not clear whether the auditor analyzed respondent's trust account bank statements and other records to reach his conclusion or whether he used only copies of canceled checks and perhaps some deposit slips. Finally,

the record does not disclose whether the auditor ever confronted respondent with the results of his analysis in order to give respondent an opportunity to reply to the apparent discrepancy.

In addition to respondent's alleged failure to properly account for estate funds and to keep those records required by R. 1:21-6, respondent was charged with gross neglect in his handling of the estate. Specifically, respondent failed to file an estate tax return with the State Division of Taxation for a period of over eight years. The auditor testified that, while respondent had partially completed the return, respondent admitted that he had never filed it, apparently due to frustration he was experiencing over the litigation Catala's ex-wife (grievant) had filed. Specifically, grievant, who was the mother of the two minor beneficiaries under the will, had filed suit seeking to set aside the judgment of divorce. Ancillary thereto, a dispute arose regarding some discrepancy in respondent's handling of the estate funds. Grievant had alleged that respondent had not accounted for all of the estate funds. At some point, therefore, the court threatened to hold respondent personally responsible for any shortage in the estate funds. In fact, at the time of the auditor's investigation, that eventually came to pass; judgment had been entered against respondent for an unknown amount and collection efforts had begun. Respondent has never satisfied that judgment. The record does not disclose the current status of the estate or the extent of respondent's current involvement with the estate, if any.

In connection with the litigation filed by grievant, on June 16, 1992 respondent wrote a letter to the court in response to exceptions raised by grievant to respondent's preliminary accounting. In the fourth numbered paragraph of that letter, respondent stated, "inheritance tax return has now been filed and tax waivers requested." Exhibit 13. In fact, as previously noted, that was not true. Respondent admitted to the auditor that he had never filed the return. In addition, the auditor had contacted the Division of Taxation to independently confirm that the tax return had not been filed. Respondent never sent the letter of June 16, 1992 to the court. Rather, he forwarded the letter to grievant's counsel, expecting counsel to forward it to the court. Apparently, the letter was never sent to the court. The auditor testified that respondent informed him that, at the time he wrote that letter, he was extremely concerned and upset because he believed that the court was about to enter judgment against him personally. He, therefore, felt he "just had to get something together for the court and for the opposing counsel, to get the matter over with."

T31.¹ There is no evidence to suggest that respondent's misrepresentation in that letter was the result of inadvertence or mistake.

Moreover, the complaint charged that respondent wrote that letter on his professional letterhead several weeks after he had been suspended from the practice of law. The OAE, therefore, maintained that respondent had misrepresented his status as an

¹ "T" denotes the DEC hearing transcript of October 7, 1994.

attorney. It should be noted, however, that, according to the auditor, the court had been aware of respondent's earlier suspension and, therefore, asked respondent to participate in the litigation as a knowledgeable person. (Respondent was not a party to that suit). In addition, the last paragraph of that letter reads, in relevant part, "I would like to take this opportunity to thank the Court and Mr. Holt for the professional way that you both have dealt with the unpleasant situation that I am presently in." Exhibit 13. It appears that respondent may have been referring to his suspension.

Finally, respondent was also charged with a failure to cooperate with disciplinary authorities. The OAE auditor testified that respondent had, indeed, cooperated with his investigation. He believed, however, that respondent may have misrepresented to him the timing of his efforts to reconstruct the estate file, after it had been stolen from his car in February 1991. Specifically, respondent advised the auditor that he made immediate attempts to reconstruct the file following its theft. However, the first documentary evidence of any such attempt was in late March 1992 — over one year later. See, e.g., Exhibits 11-1 through 11-10. (There is no allegation that respondent fabricated the theft claim).

The presenter testified that, despite several efforts on his part, respondent never filed an answer to the complaint. See also Exhibits 14 and 17. Moreover, respondent did not appear at the DEC hearing on October 7, 1994, despite proper notice. Similarly, he

did not appear at a previously scheduled hearing, which was ultimately adjourned due to a panel member's failure to attend because of a scheduling error. While the presenter did not offer any testimony that would shed any light on respondent's present whereabouts, he did advise the DEC that respondent has an answering machine to take his telephone calls at his place of business.

* * *

The DEC found respondent guilty of violations of RPC 1.15 and R. 1:21-6 for his failure to maintain the required attorney trust account records and for his failure to account for all of the estate funds. The DEC also found respondent guilty of a violation of RPC 1.1(a) for his failure to file an estate tax return for over eight years. In addition, the DEC found that respondent's negligent conduct in this matter, when combined with his conduct in the two previous matters for which he was disciplined, constituted a pattern of neglect, in violation of RPC 1.1(b). Furthermore, the DEC found respondent guilty of misrepresentation, in violation of RPC 8.4(c), for his false statement in the June 16, 1992 letter and for his use of his professional letterhead stationery to pen that letter several weeks after his suspension. Finally, the DEC found respondent guilty of a violation of RPC 8.1(b) for his failure to file an answer to the ethics complaint and to appear at the scheduled DEC hearings.

The DEC recommended that respondent be suspended for a period

of eighteen months, that he be required to undergo psychiatric counseling to enable him to "have a more realistic approach to what he has done and the severity of his actions" and that he be required to practice under the supervision of a proctor, chosen by the OAE, for a period of one year. Hearing panel report at 8.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the evidence. Respondent admittedly failed to file an estate tax return for a period of over eight years. His frustration with the underlying litigation did not relieve him of his responsibility to make the required filings, as the attorney for the estate. His failure to do so over such an extended period of time, especially after having partially completed the return itself, amounts to gross neglect, in violation of RPC 1.1(a). Moreover, when combined with the prior actions for which he has been disciplined, respondent's misconduct amounts to a pattern of neglect, in violation of RPC 1.1(b).

Similarly, respondent's failure to file an answer to the formal complaint and to appear at the DEC hearings constitutes a violation of RPC 8.1(b). Respondent's violation in this regard is particularly serious, given his past experience with the ethics system. It is clear that this respondent has no regard for his

responsibility toward the disciplinary system.

The Board agrees with the DEC's conclusion that respondent's representation in his June 16, 1992 letter — that the tax return had been filed and tax waivers requested — constituted a misrepresentation at least to opposing counsel, who actually received the letter. Respondent's conduct in this regard violated RPC 8.4(c). However, because the letter never reached the court it cannot be concluded that respondent was guilty of misrepresentation to or fraud upon the court. Nevertheless, it is clear that respondent intended the letter to reach the court at some point and intended for the court to rely upon that information in determining whether to impose personal liability upon respondent. His conduct vis-à-vis the court, therefore, represented at least an attempt to make a misrepresentation, in violation of RPC 8.4(a).

The Board cannot agree with the DEC's finding that respondent's use of his professional letterhead to pen the letter to the court constituted a misrepresentation. It is true that respondent wrote that letter several weeks after he had been suspended and that his conduct on that score technically violated Guideline 23. However, the evidence also established that the court and opposing counsel knew that respondent had been suspended. Therefore, the court asked respondent to participate as an "individual with particular knowledge" — not as an attorney. See items 29 through 31 to Exhibit 10. That being the case, respondent's use of the letterhead did not constitute a misrepresentation to the court or opposing counsel.

Most troubling in this case is the characterization of respondent's conduct toward the estate funds. Admittedly, respondent did not keep the required records. In the absence of a shortage in the trust account, failure to maintain the required records has, ordinarily, resulted only in an admonition. See, e.g., In the Matter of Richard J. Doyle, (February 14, 1995) (admonition imposed where attorney did not keep required trust account records, including receipts and disbursement journals and fully descriptive client ledger cards and failed to properly reconcile his trust account and to keep a running balance for his trust account).

In this case, there is insufficient evidence to conclude that there was a shortage of funds. The OAE auditor testified that he did not have all available records. Furthermore, in his analysis (Exhibit 12), the auditor characterized the funds for which he could not account as just that: "unaccounted funds." Nowhere in the record is there any indication that there was a shortage. Indeed, the OAE auditor seemed to recognize that there may very well have been documentation to support additional estate expenditures not available to him; hence his reluctance to characterize respondent's misconduct as negligent or knowing misappropriation. Therefore, given the lack of clear and convincing evidence of the existence of a shortage, respondent's conduct amounts to a failure to maintain required records. Although respondent was also charged with failure to account for estate funds, and, although the Board views a failure to account for funds

as a more serious offense than a failure to keep required records, the record is devoid of any evidence to establishing that respondent was confronted with evidence of the \$680.42 "unaccounted funds." It is true that he was confronted with the discrepancy between the amount on deposit in his former firm trust account and the amount deposited to the Sarcone trust account. However, that discrepancy seemed to have been resolved by the auditor's subsequent analysis. Therefore, while the Board finds respondent guilty of a failure to keep the financial records required by R. 1:21-6, in violation of RPC 1.15(d), the Board has determined to dismiss the charge that respondent failed to account for trust funds.

That notwithstanding, respondent's misconduct, taken as a whole, was serious. Cases involving a failure to cooperate with disciplinary authorities, alone, have resulted in discipline ranging between an admonition and a term of suspension. See, e.g. In re Skokos, 113 N.J. 389 (1988) (attorney publicly reprimanded for failure to reply to investigator's requests for information, failure to file an answer to the formal complaint and failure to appear at the committee hearing) and In re Beck, 127 N.J. 391 (1992) (attorney suspended for three months for failure to cooperate with disciplinary authority's investigation of three complaints). The Board recognizes that the purpose of discipline is not the punishment of the offender, but "protection of the public against an attorney who cannot or will not measure up to the high standards of responsibility required of every member of the

profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Both mitigating factors and aggravating factors are, therefore, relevant and may be considered. In re Hughes, 90 N.J. 32, 36 (1982).

There is a plethora of aggravating factors in this case. Most significant, is respondent's prior disciplinary history. Respondent simply has not learned from his past mistakes. Perhaps most illustrative of respondent's apparent failure to appreciate the seriousness of his ethics obligations is his misrepresentation in his letter of June 12, 1992 — only weeks after he had been suspended for three months for misrepresentation to a client.

Respondent has been admitted to the bar since 1984. His reign of misconduct began only one year later and has continued to date. Furthermore, respondent's failure to cooperate with the DEC in this matter combines with yet another pattern of non-cooperation in respondent's ethics history.

The Board is particularly disturbed by respondent's failure to cooperate in this matter. He knew that the OAE's investigation involved serious accusations, including misrepresentation and possible misappropriation. Yet, respondent chose to ignore his obligation to cooperate in the midst of the OAE's investigation and in the face of these very serious allegations. Such repeated disrespect cannot be countenanced.

Under a totality of the circumstances, the Board has unanimously determined that respondent should receive a two-year suspension for his misconduct, which included gross neglect, engaging in a pattern of neglect, misrepresentation, failure to maintain required financial records and repeated failure to cooperate with the disciplinary authorities. Like the DEC, the Board concluded that such a long-term suspension is necessary to give respondent time to reflect upon his conduct and his ability to comply with his ethics obligations. Furthermore, because the Board was troubled by the inconsistent nature of the little financial evidence that was submitted by respondent, it has determined to require him to submit to the OAE an accounting of the estate funds prior to reinstatement. Upon readmission, respondent must practice under the supervision of a proctor for a period of two years. One member did not participate.

The Board strongly cautions respondent that any further misconduct on his part will be met with harsher discipline.

The Board further directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated:

8/11/95

By:



Raymond R. Trombadore
Chair
Disciplinary Review Board