Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-288

IN THE MATTER OF

FRANCIS H. SCALESSA,

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: March 11, 1996

Jay Lavroff appeared on behalf of the District XII 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 discipline filed by the District XII Ethics Committee (DEC), arising out of misconduct in six matters. The complaints charged respondent with numerous instances of unethical conduct. For the sake of clarity, the specific charges are set forth in the recitation of the facts of each matter.

On October 25, 1994, the day before the second DEC hearing in this case, respondent filed an answer in two matters, Gold and Alexander. In his answer, respondent admitted the majority of the allegations. During the DEC hearing, respondent essentially admitted the allegations against him in each of the matters.

Respondent was admitted to the New Jersey bar in 1972. He maintains an office in Summit, Union County. On May 23, 1994

respondent was privately reprimanded for misconduct in two matters. Specifically, respondent was found guilty of gross neglect, lack of diligence and failure to communicate in connection with a real estate matter. He also lost will and trust documents that he had been asked to review and subsequently failed to reply to his clients' requests for information. In a second matter, respondent was again found guilty of gross neglect, lack of diligence and failure to communicate in a real estate transaction.

In addition, respondent was temporarily suspended in May 1991 for a trust account overdraft. Following satisfactory explanation to the Court, he was reinstated on May 14, 1991.

* * *

COUNT I: The Stewart Matter (District Docket No. XII-93-16E)

In 1982, Ila Stewart retained respondent to represent her in a collection matter. Respondent negotiated a settlement and a payment plan in Ms. Stewart's behalf. Ms. Stewart made the final payment in October 1991. She did not, however, receive documentation that the account was paid in full because the creditor's records mistakenly indicated that there was an outstanding balance.

Thereafter, Ms. Stewart contacted respondent for assistance. At respondent's request, in or about mid-March 1992, Ms. Stewart gave him documentation of her payment history. On that date, while Ms. Stewart was in respondent's office, he unsuccessfully attempted to reach the creditor. Respondent told Ms. Stewart that he would call her in a few days. When approximately one week passed and no

call was forthcoming, Ms. Stewart called respondent, who stated that he had not yet contacted the creditor. Thereafter, Ms. Stewart left numerous messages for respondent, seeking information on the status of the matter. Respondent did not return her calls.

By certified letter dated September 21, 1992, Ms. Stewart reminded respondent of her numerous unreturned calls and requested that he turn over the documents to her. Respondent did not reply to the letter or forward Ms. Stewart's documents to her. On September 25, 1994, two years after Ms. Stewart's letter and the night before the DEC hearing, respondent went to her house and returned her documents.

The complaint charged respondent with violations of RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 1.15(b) (failure to promptly deliver client property). Respondent admitted his misconduct in this matter.

The DEC determined that respondent had violated each of the charged rules.

COUNT II: The Gold Matter (District Docket No. XII-93-24E)

In 1992, respondent represented Stephen and Karen Gold in both the sale and the purchase of real estate. Respondent had previously represented the Golds in another real estate transaction. The Golds requested that respondent add a specific contingency clause to the contract for the sale of their existing house. By letter dated February 17, 1992, respondent notified the

buyers' attorney of certain clauses that should be added to the contract. The requested contingency clause was not mentioned in respondent's letter. When the Golds received a copy of respondent's letter, they alerted him about the omission. Respondent then sent a letter dated February 20, 1992 to the buyers' attorney, supplementing the February 17 letter and including the requested clause. Respondent's February 20 letter stated that he had discussed the clause with the buyers' attorney the previous week, but had forgotten to include the clause in the February 17 letter. The contingency clause was made a part of the contract.

The Golds' two closings took place on April 21, 1992. Sometime thereafter, the Golds received a letter from the mortgage company complaining that several attempts to obtain settlement information from respondent to complete the company's file had been unsuccessful. In fact, respondent had not replied to four such requests.

In November 1992, Mr. Gold went to the Morris County Hall of Records and ascertained that the mortgage on their former house had not been canceled of record. Thereafter, he left three to five telephone messages on respondent's answering machine, inquiring about the non-cancellation of the mortgage. Respondent failed to reply to his messages and later testified that he had no specific recollection of these calls.

After the closing, the Golds made numerous requests of respondent for a copy of their title insurance policy, which

requests were ignored. The Golds then contacted the title insurance company and learned that the policy had never been issued because respondent had not complied with the company's requests for information.

At some point, the Golds also learned that respondent had not paid sewer taxes in the amount of $278.31, despite the fact that he had collected funds for that purpose at the closing. The Golds eventually paid those taxes. Respondent ultimately reimbursed the Golds for the amount of the taxes plus interest.

The Golds ultimately sought the assistance of new counsel. By certified letter dated February 26, 1993, the Golds requested that respondent forward their file to their new attorney. Despite receiving the Gold's letter, respondent did not comply with their request.

The complaint charged respondent with violations of RPC 1.1(b), RPC 1.3 and RPC 1.4(a). [In its report, the DEC mistakenly stated that respondent had been charged with a violation of RPC 1.15(b)]. Respondent admitted all allegations but the failure to include the contingency clause in the contract. In addition, respondent contended that it was the responsibility of the buyer's attorney – not his – to cancel the mortgage of record on the house sold by the Golds. Respondent conceded, however, that he should have followed up and confirmed that it had been done. He admitted that he had no communication with the buyers' attorney or with the Golds regarding the cancellation of the mortgage.

Respondent admitted that he did not comply with requests for information from either the mortgage company or the title insurance company; that he ignored the Golds' requests for the title insurance policy and for their file; and that he did not pay the sewer taxes.

The DEC determined that respondent violated each of the charged rules.

COUNT III: The Daly Matter (District Docket No. XII-93-28E)

Respondent represented Joseph and Marilyn Daly in the refinancing of their mortgage. Respondent had previously – and satisfactorily – represented a partnership in which the Dalys were involved. The closing for the Dalys' refinancing took place on September 1, 1992. Included in the costs was $726 for a title insurance policy. At the time of closing, Mr. Daly did not receive the policy, which he did not find unusual. According to Mr. Daly's testimony, respondent estimated that Mr. Daly would receive the policy by October 15, 1992. Mr. Daly also believed that he would be receiving a mortgagee's title insurance policy, which he had sought because of the increased value of his house after improvements.

After October 15, 1992 passed, Mr. Daly left several messages on respondent's answering machine, seeking information about the missing policy. Respondent did not reply to Mr. Daly's calls. Thereafter, by letters dated December 2, 1992 and February 8 and March 24, 1993, Mr. Daly requested that respondent supply

information on the status of the policy. Respondent did not reply, except for a telephone conversation with Mrs. Daly in January or February 1993, during which respondent stated that "the title insurance company policy [was] in the hands of the title company." T9/26/94 17-18.

On or about July 2, 1993, after first contacting the mortgage company and the title insurance company, Mr. Daly learned from the title agency that the payment for the insurance had been received only two weeks before. Mr. Daly was further advised at that time that the mortgagee's policy would cost an additional $20. Mr. Daly paid the additional fee and received the title insurance policy in July or August 1993.

Respondent testified that he generally told his clients that their title insurance policy would be issued three to four months after the closing. He did not recall specifically what he said to Mr. Daly in this regard, but found it "hard to believe" that he had promised the policy by October 15, 1992, only six weeks after the closing. Respondent also testified that he sent the $726 premium payment to the title insurance company in a "timely fashion." T9/26/94 40. Although respondent offered to furnish the canceled check to the DEC, he did not do so and did not give a specific date on which the payment had been forwarded.

The complaint charged respondent with violations of RPC 1.1(b), RPC 1.3 and RPC 1.4(a). (The DEC erroneously referred to a charge of violation of RPC 1.15(b) in this matter). Respondent admitted that he was guilty of the allegations of the complaint.

The DEC determined that respondent violated each of the charged rules. (RPC 1.4(a) was mistakenly cited as RPC 1.1).

COUNT IV: The Kwacz Matter (District Docket No. XII-93-35E)

In 1991, respondent represented Richard and Elizabeth Kwacz in the purchase of undeveloped residential real estate. Respondent, who had not previously represented the Kwaczes, quoted them a fee of $600 to $650. He did not give the Kwaczes a written fee agreement.

Due to difficulties between the builder and the township in which the property was located, the closing, originally scheduled for the fall of 1991, was delayed. In fact, on one occasion, on November 7, 1991, the parties met for the closing, but it did not take place. In early November, however, Mr. Kwacz gave respondent most of the funds (approximately $116,000) necessary for the purchase of the property, to be held in trust pending the resolution of the remaining issues. Mr. Kwacz turned over the balance of the funds to respondent in December 1991.

The problems between the builder and the township were resolved in January 1992. For reasons not clear from the record, however, the closing did not take place until July 22, 1992. As the DEC noted, there was no "physical closing" held. The Kwaczes signed the closing documents in advance and the transaction was completed by mail. Respondent explained that, in fact, a number of the issues had remained unresolved until August and payment had not been forwarded to the builder until that time.

Throughout this time, Mr. Kwacz left numerous messages on respondent's answering machine, inquiring about the status of the transaction. Although it is unclear what precisely respondent said during several conversations with Mr. Kwacz, it is clear that respondent failed to tell him that the closing had already taken place.

In October 1992, when Mr. Kwacz talked to the builder about an unrelated issue, he learned from the builder that the closing had occurred. Mr. Kwacz then contacted respondent, who confirmed the July 1992 closing date. Respondent "apologized profusely for the delay" and stated that he would forward the closing documents to Mr. Kwacz. T10/26/94 57. On October 13, 1992, respondent "faxed" a message to Mr. Kwacz indicating that a check for the interest accrued on the funds held in trust had been mailed to Mr. Kwacz the weekend before and that additional documents would follow later that week. Although Mr. Kwacz received the check shortly thereafter, he did not get additional documents that week. Mr. Kwacz' subsequent calls to respondent went unanswered. Thereafter, on December 30, 1992, respondent "faxed" to Mr. Kwacz a copy of the closing statement and the unrecorded deed, dated September 13, 1991. (Mr. Kwacz was unable to explain why the deed bore that date; it coincides, however, with the originally planned closing in the fall of 1991). The deed was recorded on January 7, 1993, as respondent did not send it for recording until December 23, 1992. On February 3, 1993, respondent sent Mr. Kwacz $177.81 owed to him

from the escrow funds. In April 1993, respondent mailed a copy of the recorded deed to Mr. Kwacz.

Throughout this period, Mr. Kwacz continued, via "fax" and telephone, to request documents and information from respondent. On occasion, respondent replied to Mr. Kwacz, assuring him that the documents were forthcoming.

On June 3, 1993, Mr. Kwacz called the title insurance company and learned that respondent had not forwarded the premium payment. On that same date, the title insurance company sent a letter to respondent asking for the payment, which respondent still did not forward.

Mr. Kwacz was unable to contact respondent to discuss the policy matter. Ultimately, Mr. Kwacz obtained the insurance without respondent's assistance. Respondent subsequently refunded the title insurance money to Mr. Kwacz, as seen below.[1]

This matter was the subject of a fee arbitration hearing on June 10, 1994, at which respondent did not appear. By determination dated June 13, 1994, Mr. Kwacz was awarded $150, which respondent paid in or about late September 1994. (Mr. Kwacz stated that the delay in payment may have been attributable to the fact that respondent did not know his new address). When Mr. Kwacz received the payment, he called respondent to acknowledge its receipt and also to ask about the title insurance policy money.

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[1] In a "fax" to Mr. Kwacz dated January 20, 1993, respondent stated, "[w]hen the deed is returned the title policy will be available...." Exhibit P-25. Respondent made a similar statement in a "fax" to Mr. Kwacz dated April 19, 1993. Exhibit P-27. Given that respondent had not forwarded the payment for the title policy, these statements were obviously untrue.

Respondent assured Mr. Kwacz that he would refund the money and, thereafter, paid Mr. Kwacz the amount of the title insurance, $876, and an additional $75 in interest.

The complaint charged respondent with violations of RPC 1.1(b), RPC 1.3, RPC 1.4(a), RPC 1.5(b) and RPC 1.15(b). With regard to the violation of RPC 1.5(b), the DEC noted that there had been significant problems in connection with the closing that would usually justify an additional fee. Respondent, however, did not provide Mr. Kwacz with a written fee agreement, which would likely have included a clause entitling respondent to a higher fee for extraordinary work. The DEC also noted that respondent had not discussed the additional fee with Mr. Kwacz prior to the July 22, 1992 closing. The DEC, therefore, concluded that respondent was not entitled to the additional fee.

The DEC found that respondent had violated each of the charged rules.

COUNT V: The Hart Matter (District Docket No. XII-93-72E)

In 1992, Lucretia Hart retained respondent to handle the administration of the estate of her husband, who had passed away on March 8, 1992. There is no suggestion that respondent improperly handled the estate.

In June 1992, Mrs. Hart requested that respondent transfer her late husband's stock certificates to her own name. Mrs. Hart delivered the stock certificates to respondent and, on July 8, 1992, signed affidavits to accomplish the transfer. After an

unspecified period of time, Mrs. Hart began to leave messages on respondent's answering machine inquiring about the status of the stock transfer. Mrs. Hart's son and brother, who knew respondent, also left messages for him asking about the transfer. Respondent ignored those messages. Mrs. Hart was aware during this time that the transfer had not been made because she continued to receive dividend checks and 1099 forms for the dividends in her late husband's name. Approximately one year after Mrs. Hart gave respondent the certificates, her son and brother had a conference with respondent at his office. Respondent informed them that the transfer was "in the works" and that the certificates would be issued shortly thereafter. They were not, however.

Because of respondent's continued failure to reply to requests for information and to provide the reissued certificates, in 1993 Mrs. Hart left a message for respondent, asking for the return of the stock certificates, even if the transfer had not yet been completed. Respondent did not comply with her request. Mrs. Hart's son also contacted respondent, who promised on one occasion that the certificates would be returned in approximately one week. In fact, respondent did not return the certificates until September 25, 1994, the night before the DEC hearing. The certificates -- left under Mrs. Hart's door mat -- were still in the name of Mrs. Hart's late husband.

Respondent admitted that, although he initially began to pursue the stock transfer, ascertaining from a stockbroker what

documents were needed and obtaining them, he failed to follow through on the matter.

The complaint charged respondent with violations of RPC 1.1(b), RPC 1.3, RPC 1.4(a) and RPC 1.15(b). The DEC concluded that respondent had violated each of the charged rules.

COUNT VI: The Alexander Matter (District Docket No. XII-94-01E)

On May 11, 1993, respondent represented Guy and Suzanne Bocage in the purchase of residential real estate. The seller, Hunters View, Inc., was represented by Robert L. Alexander, Esq., the grievant herein. At the time of closing, $5,000 of the sale proceeds was given to respondent to hold in escrow for the payment of New Jersey farm rollback taxes.

By letter dated August 18, 1993, Mr. Alexander informed respondent of the amount of the rollback tax due and requested that the remaining $1,750.02 be forwarded to him. Respondent failed to pay the taxes or to forward the balance due to Mr. Alexander. By letter dated September 9, 1993, Mr. Alexander again requested that respondent return the $1,750.02. Mr. Alexander "faxed" copies of the September 9, 1993 letter to respondent on October 5, 1993 and November 30, 1993, indicating that those were his third and fourth requests for the payment. Respondent did not reply.

At some point thereafter, Mr. Alexander contacted the tax collector and learned that the Bocages' mortgage company had paid the rollback taxes. By letter dated December 3, 1993, Mr. Alexander so informed respondent and asked that he reply to the

previous letters about the escrowed funds. (Respondent testified that he learned from the Bocages that the taxes had been paid by the mortgage company). Thereafter, despite telephone calls from Mr. Alexander, during which, according to Mr. Alexander, respondent stated that the checks had been mailed to the tax collector and to Mr. Alexander, the latter did not receive the check. Respondent also did not forward the funds to the tax collector.

Ultimately, in February 1994, respondent reimbursed $4,134.81 to the mortgage company, the entire amount of the tax paid, not taking into account that the responsibility for the taxes belonged to both the buyer and the seller. Respondent did not inform Mr. Alexander of the transfer of the funds. Mr. Alexander learned of the disbursement of the funds from the OAE after that office's investigation of respondent's activities. Thereafter, Mr. Alexander contacted the Bocages directly. By letter dated September 16, 1994, the Bocages informed respondent that the seller had attempted to satisfy their "punch list" items and instructed respondent to turn over to the seller the funds remaining in his trust account. On September 29, 1994, respondent forwarded $865.19, the balance of the funds in escrow, to the seller. Although the record is not clear, it appears that the remainder owed to the seller is being paid in installments by the Bocages.

Respondent essentially admitted that the facts in this matter were as presented by Mr. Alexander, although he disputed Mr. Alexander's calculations as to the escrow due to the sellers.

While respondent remembered a conversation with Mr. Alexander on one occasion in December 1993, he did not recall stating that checks had been mailed. He also did not recall receiving the December 3, 1993 letter. The DEC found Mr. Alexander, who had taken contemporaneous notes of his conversations with respondent, to be the more credible witness in this regard.

Respondent introduced evidence of problems between the Bocages and the seller about "punch list" items and other construction problems, apparently arguing that the funds escrowed for the rollback taxes could, therefore, be withheld for other purposes. Mr. Alexander testified that respondent never mentioned a "punch list" to him. Instead, he first saw a reference to it in respondent's August 1994 communication to the OAE.

The DEC determined that respondent had violated RPC 1.1(b), RPC 1.3, RPC 1.15(b) and RPC 4.1(a)(1),[2] as charged. With regard to respondent's contention that he held the escrowed tax money because of the "punch list" and other construction problems, the DEC noted that any problems between the Bocages and the seller were unrelated to the payment of the rollback taxes. The DEC remarked that $5,000 had been escrowed for a particular purpose and that it could not be directed to another purpose.

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[2] Respondent was originally charged in this matter with a violation of RPC 8.4(b) and (c) (criminal act and conduct involving dishonesty, fraud, deceit or misrepresentation), arising out of his failure to turn over escrow funds. The allegation was investigated by the Office of Attorney Ethics (OAE) prior to the DEC hearing. The OAE was satisfied that respondent was not guilty of knowing misappropriation of client funds and, accordingly, the alleged violations of RPC 8.4(b) and (c) were withdrawn by the presenter.

The DEC further found a pattern of neglect, in violation of RPC 1.1(b), when these matters – excluding the Alexander matter – were considered in concert.

Failure to Cooperate with the DEC

The DEC investigator wrote to respondent in connection with each of the above six matters and asked that he reply to the allegations in the grievances. Despite receiving the letters, respondent did not comply with the investigator's requests. Also, respondent did not answer the formal complaints until the day before the second DEC hearing date, at which time he filed an answer in two of the six matters.

Respondent was charged with a violation of RPC 8.1(b) in each of the six matters. The DEC found him guilty of violation of that rule in each case.

* * *

The DEC determined that all in all respondent was guilty of a pattern of neglect and lack of diligence in six matters, failure to communicate in five matters, failure to turn over client property in four matters, failure to provide a written retainer and making a false statement to a third party in one matter each and failure to cooperate in six matters.

The DEC recommended that respondent be suspended for a period of three months and that he submit proof of fitness to practice law, prior to reinstatement. The DEC further recommended that,

upon reinstatement, respondent practice under the supervision of a proctor for one year.

* * *

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 in each instance is fully supported by clear and convincing evidence.

The one exception was the DEC's finding of a violation of RPC 1.1(b) (pattern of neglect) in each of these six matters.[3] More properly, respondent was guilty of gross neglect in each of these matters, in violation of RPC 1.1(a), and of a pattern of neglect when all matters were considered together. Given the nature of the cases and the extensive record provided, the Board has deemed the complaint amended to conform to the proofs and finds a violation of RPC 1.1(a) in each of these matters. See In re Logan, 70 N.J. 222 (1976).

The record also supports a finding that respondent made misrepresentations to his clients and to third parties, in violation of RPC 8.4(c), a charge not included in the complaint. For example, in the Kwacz, Hart and Alexander matters, respondent stated that closing documents, stock certificates and checks, respectively, were forthcoming, when that was clearly not the case.

[3] Included in the DEC's finding of a violation of RPC 1.1(b) in the Gold matter was respondent's initial failure to add the contingency clause to the contract. The DEC deemed this part of the overall pattern of neglect in this matter. The Board, however, treated respondent's conduct as a simple error and nothing more.

Here, too, the Board deemed the complaint amended, finding a violation of RPC 8.4(c) in those three matters.

Despite prodding by the DEC, respondent did not introduce evidence of any disability or any explanation whatsoever for his misconduct in these matters. Respondent told the Board that he has no substance abuse or psychological problems. Accordingly, there is nothing in the record to mitigate his ethics offenses. To the contrary, his prior private reprimand and his temporary suspension are aggravating factors.

With regard to the timing of respondent's misconduct in these matters vis-à-vis the unethical conduct that led to the private reprimand, the latter began in 1989 and continued through 1991. His actions in the matters now before the Board generally occurred after that time and were, for the most part, prior to the issuance of the letter of reprimand. While it cannot be said that respondent failed to learn from his prior mistakes, it is clear that his prior misconduct had already been brought to his attention. He was, therefore, on notice that his behavior in that earlier matter was questionable, at best.

According to respondent, he recognized that his behavior was not appropriate and now runs his practice differently. He testified as follows:

> . . . I basically run a one-man shop and I have someone that does some typing for me. I do most of my own typing. I looked at the situation very hard, it hit home for me and I do realize there is a procrastination issue, a denial issue like an alcoholic or drug problem who denies they have a problem. Obviously here I was denying there were problems and I didn't address them or take care of them and I am trying to deal with that. I

> recognize that it happened in these situations. As I said, I am making an effort and I have made an effort to get back to people to get things done timely when they come back from the registrar of the clerk [sic], get them out the same day. Don't wait. There's no problem with my legal abilities, its just that those situations I dragged my feet, ducked my head, put my head in the sand and I acknowledged I did that. I am not happy I did that. That's basically it.
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> [T10/26/94 150-151]

The Board voted unanimously to impose a three-month suspension. See In re Hodge, 130 N.J. 534 (1993). In making this determination, the Board considered respondent's recognition of his wrongdoing and apparent efforts to bring his practices into compliance with the standards expected of the profession.

Prior to reinstatement, respondent is to complete twelve hours of professional responsibility courses offered by the Institute for Continuing Legal Education or a similar agency and to submit proof of fitness to practice law. Upon restoration, respondent is to be supervised by a proctor for two years.

Additionally, for a two-year period respondent is to be the subject of certified annual audits conducted by an accountant approved by the OAE.

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

Dated: 3/11/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board