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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-092

IN THE MATTER OF :
ALAN E. DENENBERG, :
AN ATTORNEY AT LAW :

Decision

Argued: May 15, 1996

Decided: October 17, 1996

Thomas J. Shusted, Jr. appeared on behalf of the District IV Ethics Committee.

Carl D. Poplar appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a recommendation for discipline filed by the District IV Ethics Committee (DEC). Respondent was charged with violations of RPC 3.2 (failure to expedite litigation); RPC 3.3(a) (false statement of material fact to a tribunal); RPC 3.4(c) (disobeying an obligation under the rules of a tribunal); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1989 and is also a member of the Pennsylvania bar. His primary office is in Philadelphia, Pennsylvania. He also handles New Jersey matters

from an office in Cherry Hill, New Jersey. Respondent has no history of discipline.

This matter arose from respondent's representation of a client by pro hac vice admission in the Federal District Court for the District of Delaware. José Elias Rivera, an inmate incarcerated in Smyrna, Delaware, wrote to respondent and requested that he represent him in a civil rights case against a Wilmington, Delaware police officer. Respondent accepted the case and sought the assistance of Delaware counsel. Douglas Shachtman, a Delaware attorney experienced in civil rights cases and Delaware federal district court procedures, agreed to act as co-counsel.

The chronology of events in the Rivera matter that led to the grievance by the federal district court judge is not disputed:

A court order dated March 28, 1994 scheduled a pretrial conference for July 11, 1994 at 10 A.M. On or about June 24, 1994, respondent and his co-counsel filed a petition for leave to withdraw from the representation alleging, among other things, a breakdown in communication with Rivera based on his ill health, uncooperative nature, as well as the geographical constraints. On that same date, respondent also moved for a sixty-day extension of the July 25, 1994 trial date and of the time to respond to the defendant's motion for summary judgment. Respondent's motions were denied on June 31, 1994.

On July 5, 1994, respondent wrote to District Court Judge Roderick R. McKelvie indicating that he would be unable to attend the pretrial conference on July 11, 1994 because he was "attached

for trial in the United States District Court for the Eastern District of Pennsylvania" in another matter (Elisio). That trial was scheduled to start at 9:30 A.M. before Judge Faith Angell. Respondent further noted that he was also scheduled to be placed "in the trial pool of the Honorable Clarence C. Newcomer" in a third case (Bowie), which was likely to start on July 26, 1994 or shortly thereafter. Because of those circumstances, respondent requested that the pretrial conference and the trial date be rescheduled.

Respondent testified that, after he had written to the court and approximately one week before the scheduled pretrial conference, Judge McKelvie's law clerk called him with two options: the pretrial conference would be pushed back to 5:30 P.M. on the same day or local counsel could appear in his stead. Respondent explained to the law clerk that, even if his Pennsylvania trial were concluded by 4:30 P.M., he did not believe he could arrive in Delaware by 5:30 P.M. Respondent, therefore, chose to have co-counsel appear at the pretrial conference. Shachtman did, in fact, appear on July 11, 1994. Respondent was not aware of any problem with Shachtman's appearance.

According to respondent, on July 8, 1994 a pretrial conference was held in the Elisio case in the Eastern District of Pennsylvania. That Friday afternoon, respondent received a settlement offer from his adversary in Elisio. Thereafter, he attempted to contact his client, but did not obtain her consent to settle until late Saturday evening.

Respondent and his adversary reached a settlement on Monday morning, July 11, 1994, just before 9:00 A.M. Respondent then contacted Judge Angell's Chambers and was advised by the judge's law clerk that it was not necessary to appear in court to have the settlement put on the record.

On the afternoon of July 11, 1994, Shachtman contacted respondent to inform him that Judge McKelvie had scheduled another pretrial conference for July 14, 1994 to clear up certain issues "in terms of the pretrial memorandum, points for charge [and] witness lists." T33.¹ Respondent believed that the judge wanted to narrow the issues for trial.

At the pretrial conference, respondent made certain misrepresentations to the judge. Respondent explained that because the judge appeared upset that he had not been at the earlier pretrial conference, "rather than get him even more upset by telling him that I settled the case early Monday and could have been in his chambers, I told him I was somewhere that I wasn't." T35.

Respondent went on to say that he had never before attended a pretrial conference in open court, inasmuch as most were heard in the judges' chambers. At the rescheduled Rivera pretrial conference, the judge "appeared on the bench in his robe with the stenographer, and his tone of voice was strict, and he began to question me about my whereabouts, almost in a cross-examination

¹ T denotes the transcript of the December 14, 1995 DEC hearing.

type fashion." Respondent testified that the experience was "both awkward and intimidating."

Respondent claimed that he attempted to correct the record at that time and tried to tell the judge that he had never appeared in chambers in the other matter, but the judge cut him off and had him sworn. The following exchange took place between Judge McKelvie and respondent:

The Court: Let me go back and talk about what happened early this week in terms of the pretrial conference.

Respondent: Yes?

The Court: How was it that you could not attend the pretrial conference?

Respondent: I was attached to trial before Magistrate or a Judge in Federal District Court, the matter of Alysio (phonetic) versus West Goshen Township Police Department. We were scheduled for trial to begin Monday morning.

The Court: And did you go to the trial?

Respondent: I went there that morning and the defendants had made a settlement offer. They got authority from — it was actually a carrier, but they needed the consent to settle from both townships. And they were able to obtain that money and we were able to settle it sometime in the late morning hours.

The Court: What time was it that you were able to settle it?

Respondent: Approximately 10:30-ish.

The Court: And what time did you check in with Judge Angell that morning?

Respondent: I was in her chambers at 9:00.

The Court: You were in her chambers at 9:00?

Respondent: Yes. We were in her office.

The Court: And you spoke to Judge Angell that morning at 9:00?

Respondent: Yes. I spoke to her chambers.

The Court: Put him under oath, Lisa.

Respondent: I spoke to the law clerk.

The Court: Excuse me. Put him under oath.

...Alan Denenberg, Esq., having been duly sworn as a witness, was examined and testified as follows...

The Court: Read back to him the dialogue we just had about what happened on Monday morning.

(The court reporter read back the record as requested.)

The Court: Now, let's go back. Do you recall when it was that Judge Angell scheduled that case for trial?

Respondent: Without her pretrial — pretrial order, I do not know the exact date that she scheduled the matter for trial.

The Court: Do you recall whether it was after I scheduled the pretrial conference for that date? July 11th?

Respondent: Honestly, I do not know. I — I would — I would believe it may have been after your Honor scheduled the pretrial conference. I believe it may have been. I don't know.

The Court: And if she had scheduled the trial after I had already scheduled the pretrial conference, did you bring to her attention that you had a scheduling conflict?

Respondent: No.

The Court: And is it your understanding that you have a trial scheduled with Judge Newcomer scheduled for the trial pool to

begin on Monday, July 26th?

Respondent: Yes.

The Court: And have you notified Judge Newcomer that you have a conflict with that date?

Respondent: Yes.

The Court: And when did you notify him of that?

Respondent: By letter yesterday.

The Court: Yesterday?

Respondent: The letter was typed, and I believe it is being hand-delivered by my office.

The Court: All right. Let me read to you a paragraph from your letter to me dated July 5th.

'In addition to the above, counsel is currently scheduled to be placed in the trial pool of the Honorable Clarence C. Newcomer in the matter of Wayne Boowey, et al, versus City of Philadelphia, et al, Civil Action No. 94-13-17. This case will most likely commence on the 26th day of July 1994 or shortly thereafter.'

* * *

The Court: What is your understanding of what was scheduled to take place in Judge Newcomer's Court on Monday, July 26th?

Respondent: Everything. Discovery deadline, pretrial conference and trial, if he called it at that time. That was my understanding. That's the way that his pretrial order read.

Court: That he would hold the pretrial conference on that date and the trial would begin that day?

Respondent: Yes. That's what the order says. I could forward a copy of his order to your Honor, if you wish.

* * *

The Court: All right.
Have you said anything this morning under oath to me that you wish to correct?

Respondent: Yes. I did not go to the Court's chambers in the morning. I just made a phone call to the Court to advise them that the case had settled.

The Court: That is, on Monday morning, July 11th, you did not go to Judge Angell's chambers?

Respondent: No, I did not.

The Court: Did you?

Respondent: No, I did not.

* * *

The Court: You understand that on April 29th Judge Angell scheduled her trial, and that you did not notify me of the conflict until you moved to withdraw. And you never did notify Judge Angell of the conflict; correct?

Respondent: That's correct.

The Court: And you understand that you have lied to me this morning about communicating with her on Monday morning; correct?

Respondent: Correct.

The Court: All right.

As a result of the foregoing exchange, the Judge determined that respondent had violated various Rules of Professional Conduct, including Delaware's Rule 3.3(a) (candor toward the tribunal) and Rule 8.4 (conduct involving deceit or misrepresentation). Based on his findings, the judge revoked respondent's admission pro hac vice and forwarded copies of that order to the Supreme Courts of New Jersey and Pennsylvania. As of the date of the DEC hearing,

Pennsylvania had not taken any action against respondent.

As mitigation, respondent provided ten character reference letters highlighting his achievements, dedication to work, integrity and general good character.

* * *

The DEC found that respondent violated RPC 3.3(a)1: "the statements to Judge McKelvie consisted of a material fact to the litigation inasmuch as the pretrial conference was part of the litigation and the lack of candor as to the respondent's whereabouts were, in fact, a material fact." The DEC also found a violation of RPC 8.4(c) because, by his own admission, respondent misrepresented facts to the court. The DEC did not find violations of RPC 3.2 or RPC 3.4.

The DEC recommended the imposition of a reprimand.

* * *

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 supported by clear and convincing evidence.

There is nothing in the record to contradict respondent's claim that Judge McKelvie's law clerk gave him the option to either attend the July 11, 1994 pretrial conference at 5:30 P.M. or send co-counsel in his place. Based on that premise, respondent

reasonably believed that Shactman's appearance at the pretrial conference was acceptable to the court. Nonetheless, his claim that he felt intimidated and awkward when he appeared before the judge does not excuse the fact that he lied to the judge about appearing before Judge Angell on July 11, 1994. To his credit, however, he did immediately recant his misstatement once he was under oath. According to respondent, he tried to do so even before he was sworn, but was cut off by the judge. The judge, however, had earlier contacted Judge Angell and Judge Newcomer's chambers and was already aware of what had actually transpired.

Judge McKelvie learned that respondent had not been completely forthright about several matters. According to Judge McKelvie, on March 30, 1994, he scheduled the Rivera pretrial conference for July 11, 1994 and a five-day trial for July 25, 1994. Judge Angell did not schedule her trial until April 29, 1994. Respondent only notified Judge McKelvie of the conflict when he moved to withdraw as counsel. Respondent never notified Judge Angell of the conflict. The pretrial conference before Judge Newcomer was not scheduled until June 13, 1994. Clearly, under these circumstances, the Rivera matter would take precedence over the other matters. To exacerbate matters, respondent lied to Judge McKelvie about appearing before Judge Angell.

In revoking respondent's pro hac vice admission, Judge McKelvie reasoned as follows:

I'm going to revoke your authorization to practice in this court based on your misrepresentation to me about your communication with Judge Angel, based on what

I think is your contemptuous behavior and writing to me about conflicts, scheduling conflicts, based on your failure to communicate to me promptly about the scheduling conflicts you've had, based on your failure to communicate with other judges about your scheduling conflicts, based on your failure to prepare a case that you represented a party in to take the matter to trial.

All right? I don't think you are fit or competent to appear in this court.

[Exhibit G, page 12 to Exhibit C-1]

The record does not reveal the outcome, if any, of the Rivera matter. Since it cannot be determined whether Rivera was prejudiced at all, there is only clear and convincing evidence that respondent's conduct violated RPC 8.4(c) for his misrepresentation to the judge.

In In re Johnson, 102 N.J. 504 (1986) an attorney received a three-month suspension when, during the course of a trial, he made misrepresentations to the trial court as to his associate's purported illness for the purpose of securing an adjournment of the case being tried.

Here, respondent's acts were not as serious. Moreover, his admission of wrongdoing, his prior unblemished record and his glowing character references mitigate his ethics infraction.

In light of these considerations, a four-member majority voted to impose a reprimand. Two members voted for dismissal, disturbed by the conduct of the federal district court in requiring respondent to testify and thereafter revoking his admission pro hac vice. One member, also displeased with the court's conduct, voted for an

admonition. Two members did not participate.

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

Dated:

10/17/96



LEE M. HYERLING
Chair

Disciplinary Review Board