Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 92-418 and
DRB 92-464

IN THE MATTER OF :
:
HOWARD J. CASPER, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 25, 1993[1]
May 12, 1993

Decided: September 21, 1993

Richard J. Engelhardt appeared at both hearings on behalf of the Office of Attorney Ethics in the matter under Docket No. DRB 92-418.

Kathie L. Renner appeared at the February 25, 1993 hearing in the matter under Docket No. DRB 92-464.

Carl D. Poplar appeared on behalf of respondent on February 25, 1993. Respondent, then pro se, did not appear on May 12, 1993.[2]

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

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[1] At the February 25, 1993 hearing, respondent's counsel requested — and was granted — the opportunity to submit to the presenters in both matters any materials or documents tending to show that respondent did not violate the Wilson rule. In addition, the Board directed that respondent make available to the OAE forthwith both his Pennsylvania and New Jersey attorney records for the purpose of having an audit conducted by the OAE within sixty days.

[2] On the day before the May 12, 1993 hearing, respondent "faxed" a letter to the Board's Office requesting an adjournment. The Board denied that request and proceeded with the hearing. Thereafter, by letter dated April 20, 1993, the OAE informed the Board's Office that it had agreed with respondent's counsel to await the receipt of any new documents to be submitted in respondent's behalf, prior to scheduling an audit. That letter also informed that respondent's counsel had not furnished the OAE with any documents within the thirty days allowed by the Board and requested that the Board adopt the OAE's recommendation for disbarment in New Jersey.

These matters were before the Board based on a recommendation for public discipline filed by the District IV Ethics Committee ("DEC") and from a Motion for Reciprocal Discipline filed by the Office of Attorney Ethics ("OAE"). One of the matters reviewed in the recommendation for public discipline case, the Twesten matter, is also the subject matter of the Motion for Reciprocal Discipline.

Respondent was admitted to the New Jersey bar in 1973. He is also a member of the Pennsylvania bar. On October 1, 1992, respondent consented to his disbarment in Pennsylvania. On November 10, 1992, he was temporarily suspended in New Jersey. Respondent has not been the subject of any prior discipline in this state.

I. Docket No. DRB 92-464
District Docket Nos. IV-91-54E and IV-92-03E
(Recommendation for Public Discipline)

A. THE TWESTEN MATTER

On March 25, 1990, Charles Twesten died following a hospitalization for serious injuries suffered in an automobile accident that occurred on March 10, 1990. Mr. Twesten was survived by his mother, Margaret, an eighty-five year old widow, and his daughter, Sharon Myers. Mr. Twesten left a holographic will, executed in 1970, leaving all of his assets to his mother.

The day after the accident, an individual named Mr. Hurley visited Margaret Twesten at her residence. Mr. Hurley claimed that his automobile also had been involved in the accident in which

Charles Twesten had been injured, although Mr. Hurley had sustained property damage only. According to Mrs. Twesten, Mr. Hurley introduced himself and informed her that he had retained respondent to represent him in connection with the accident. He suggested to Mrs. Twesten that she, too, retain respondent to pursue a claim for Mr. Twesten's injuries. Mr. Hurley indicated to Mrs. Twesten that respondent had represented his sister sometime before and that he had obtained excellent results. Mr. Hurley added that, if Mrs. Twesten engaged the same lawyer, it would be a "big help." Mrs. Twesten had neither met nor heard of respondent before.

The day after her son's funeral, respondent appeared at Mrs. Twesten's house. He asked Mrs. Twesten if her son had left a will. When she replied that he had, respondent told Mrs. Twesten that he would start proceedings to admit the will to probate. Mrs. Twesten protested, indicating that she wished to take care of that herself. Respondent insisted that he do it. He assured Mrs. Twesten that he would pick her up the following week to go to the Camden County Surrogate's office. On the scheduled date, however, respondent failed to appear.

Thereafter, Mrs. Twesten attempted to contact respondent on at least twenty-five occasions to determine the status of the matter. Four months after she initially met with respondent, she sent him a certified letter dated July 16, 1990, complaining that it had been "impossible to contact [respondent] either by phone or appointment," and requesting a "full report within ten days." Not having heard from respondent, Mrs. Twesten again sent him a

certified letter on January 14, 1991, requesting information about the probate of the will and the claim in connection with the automobile accident. Respondent also ignored that letter. In the interim, Mrs. Twesten continued to telephone respondent's office, to no avail. Ten months after Mrs. Twesten first met with respondent, she appeared at respondent's Philadelphia office unexpectedly, at which time she was able to meet with him. Respondent admitted that he had done nothing to advance the matter and explained to Mrs. Twesten that he was experiencing "problems." He promised that he would pursue the matter diligently and that he would pick her up the following Tuesday to take the will to the Surrogate's Office. Respondent neither showed up at Mrs. Twesten's house nor telephoned her to explain his absence.

In March 1991, respondent wrote to Mrs. Twesten informing her that the insurance carrier had offered $93,000 in settlement of her claims and advising her to accept the offer inasmuch as the policy limit was $100,000. He also reminded her that her son's estate would receive only $55,000 out of the $93,000 settlement because it had been agreed that one-third, or $18,000, would go to Mr. Twesten's daughter, Sharon, pursuant to respondent's agreement with Sharon's attorney. Respondent had not discussed this agreement with Mrs. Twesten before.

After Mrs. Twesten accepted the settlement offer, respondent sent her two checks for her endorsement in April 1991: one for $93,000 and the other for $5,380, representing the insurance company's reimbursement for funeral expenses that had been advanced

by Mrs. Twesten. Respondent's letter to Mrs. Twesten, enclosing both drafts, provided that "[u]pon receipt [the funds] will be deposited in our Escrow Account. The proceeds will be transferred to the Estate Account as soon as the Superior Court permits us to open one for the Estate. We will then proceed to make distribution to you and Sharon from the Estate." Exhibit P-4. Mrs. Twesten immediately endorsed the drafts and returned them to respondent via Federal Express. As of the date of the DEC hearing, October 22, 1991, respondent had not turned over to Mrs. Twesten the settlement proceeds. Indeed, asked whether she had received any money from respondent, Mrs. Twesten replied "[n]ot a penny." T10/22/1992 19.

* * *

Don Craig, staff attorney for the Camden County Surrogate's Office, also testified at the DEC hearing. According to Mr. Craig, on October 9, 1990, respondent filed a verified complaint seeking to have the will admitted to probate. On October 19, 1990, Mr. Craig advised respondent that the complaint was deficient and that it would be necessary for respondent to cure the deficiencies before the will was admitted to probate. On November 1, 1990, respondent cured the deficiencies. He was also advised that he had to submit an order to show cause providing for twenty and thirty-five days' service on all interested parties. On June 4, 1991, respondent was sent a notice that the matter would be dismissed, unless he submitted an affidavit explaining the delay in forwarding the order to show cause. The dismissal hearing was scheduled for

June 28, 1991. On that date, respondent filed an affidavit and an order to show cause, as a result of which the case was not dismissed. However, on July 2, 1991, respondent was advised that, to obtain a return date, he had to submit an order to show cause. It was not until three months later, October 10, 1991, that respondent finally forwarded the order to show cause to the Surrogate's Office. On November 21, 1991, thirteen months after the filing of the verified complaint, the will was finally admitted to probate. Thereafter, because respondent failed to supply a form of order within ten days, as required, a case management conference was scheduled for January 9, 1992. Respondent did not appear. Another case management conference was then scheduled for March 5, 1992. Before that date, however, on February 13, 1992, respondent submitted a form of order setting forth the court's decision to admit the will to probate. On February 21, 1992, a conformed copy of the order was sent to respondent, with forms to appoint Mrs. Twesten as administratrix CTA. Respondent was also instructed to pay a bond so that letters of administration could be issued. On March 23, 1992, Mrs. Twesten paid the bond and sent the forms duly signed and notarized. She also advised the Surrogate's Office that she had instructed respondent to submit the original will to that office. It was not until May 5, 1992 that respondent finally turned over the will to the Surrogate's Office. On May 6, 1992, the short certificates were finally issued, eighteen months after respondent had filed the verified complaint. According to Mr. Craig's testimony, respondent's delay in complying with the

office's requests to either cure the deficiencies or submit documents caused this matter to drag out for eighteen months, when it should have taken two or three months to be completed.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent had grossly neglected the handling of the Twesten matter, had failed to pursue it diligently and had failed to communicate with Mrs. Twesten, in violation of RPC 1.1(a), 1.3 and 1.4(a). The DEC made no findings of knowing misappropriation, a charge also absent from the complaint.

B. THE ALBERTO MATTER
District Docket No. IV-92-03E

Sandra Alberto retained respondent in April 1989 to represent her in connection with injuries arising out of an automobile accident. Ultimately, respondent settled the claim for $8,000, with which Mrs. Alberto agreed. On April 26, 1991, she signed a Release and Trust Agreement providing that, in consideration of the receipt of $8,000, the insurance carrier would be released and discharged from any claims in connection with the accident.

In May 1991, respondent mailed to Mrs. Alberto a draft for $6,400. Exhibit P-9. When Mrs. Alberto asked respondent about the $1,600 deficiency, he indicated that he would demand the balance from the carrier or institute litigation for the recovery of the remainder of the settlement. Not having heard from respondent for

a long while and having noticed that the insurance check had to be cashed within 180 days of its date, May 15, 1991, Mrs. Alberto telephoned respondent on numerous occasions, without success. Eventually, respondent's secretary left a message on Mrs. Alberto's answering machine, instructing her to return the check to respondent's office, unendorsed. Mrs. Alberto did so on November 12, 1991. She never heard from respondent again. She neither received her monies nor an explanation from respondent.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent's conduct in the Alberto matter violated RPC 1.4(a). As with the Twesten matter, the DEC made no findings of knowing misappropriation. The complaint did not charge respondent with that violation.

The DEC further found that respondent had failed to cooperate with the ethics authorities in both matters, by ignoring the investigator's requests for information about the grievances, by failing to file an answer to the formal ethics complaint and by failing to appear at the DEC hearing, in violation of RPC 8.1(b).

II. Docket No. DRB 92-418
District Docket No. XIV-92-157E
(Motion for Reciprocal Discipline)

A. THE TWESTEN MATTER

On April 29, 1992, the Disciplinary Board of Pennsylvania

notified respondent of the filing of a grievance by Robert G. Bauer, Esq., attorney for Sharon Myers, Charles Twesten's daughter. Specifically, the Pennsylvania Disciplinary Board's letter alleged that respondent had failed to communicate with Mrs. Twesten (RPC 1.4(a), failed to pursue the matter diligently (RPC 1.3), grossly neglected the handling of the case (RPC 1.1(a)), failed to expedite litigation (RPC 3.2), failed to deliver both to Mrs. Twesten and to Sharon Myers funds to which they were entitled, i.e., the settlement proceeds (RPC 1.15(b)), and made misrepresentations to Sharon Myers attorney in order to delay the settlement of the estate and the distribution of the uninsured motorist proceeds (RPC 8.4(c)).

B. THE FERLAINO MATTER

By letter dated April 4, 1989, the Pennsylvania Disciplinary Board notified respondent of a grievance filed against him by Carol Ferlaino. Specifically, the grievance alleged that respondent had failed to pay outstanding medical bills on behalf of Ms. Ferlaino in the amount of $7,937.27, notwithstanding that respondent had withheld that amount from a $35,000 settlement reached in connection with Ms. Ferlaino's personal injury lawsuit. The grievance also alleged that respondent had failed to turn over the funds to Ms. Ferlaino's stepfather, Mr. DiTizio, despite Ms. Ferlaino's repeated demands that he do so.

C. THE WISE MATTER

On February 5, 1992, the Pennsylvania Disciplinary Board informed respondent that a grievance had been filed against him alleging that he had failed to communicate with his client, Robert Wise, in violation of RPC 1.4(a), and that he had obtained a release from Mr. Wise limiting respondent's liability for malpractice, without advising Mr. Wise to seek the advice of independent counsel, in violation of RPC 1.8(h).

* * *

The Pennsylvania Disciplinary Board requested that respondent provide a written reply to the allegations set forth in all three matters within twenty days of the date of each letter and requested further that respondent submit all records demonstrating that the funds in connection with the Twesten and the Ferlaino matters had been held inviolate at all times.

On June 24, 1992, respondent signed a document resigning from the practice of law in the Commonwealth of Pennsylvania. That document states that "[respondent] submits the within resignation because he knows that he could not successfully defend himself against the charges of professional misconduct set forth in the attached [letters by the Pennsylvania Disciplinary Board]." Exhibit D to the Motion for Reciprocal Discipline. On October 1, 1992, the Supreme Court of Pennsylvania accepted respondent's resignation and ordered that he be disbarred on consent. Exhibit

A to the Motion for Reciprocal Discipline.

In its Motion for Reciprocal Discipline, the OAE pointed out that respondent may seek reinstatement in Pennsylvania five years after the effective date of his disbarment. The OAE contended that, because respondent's admissions in the Ferlaino and Twesten cases should be viewed as admissions of knowing misuse of client funds, he should be permanently disbarred in New Jersey. Arguing that the law and facts of this case require the imposition of greater discipline than that imposed in Pennsylvania (a five-year suspension), the OAE requested that the Board recommend to the Court that respondent be disbarred in New Jersey. The OAE added that, even if the Board should determine that respondent's admissions do not constitute knowing misuse of client funds, his failure to account for funds in those matters, combined with the other misconduct that he admitted in all three cases, warrants his disbarment in New Jersey.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record in both matters, the Board was satisfied that the evidence clearly and convincingly established that respondent's conduct was unethical. The Board affirmed the conclusions of the DEC in the matter leading to a recommendation for public discipline and determined that those conclusions were subsumed by the Motion for Reciprocal Discipline. The Board also granted the OAE's Motion for Reciprocal Discipline, but determined to recommend disbarment, rather than a term of

suspension equivalent to the five-year suspension ordered in Pennsylvania (As noted above, in that state a disbarred attorney may seek reinstatement five years after the effective date of disbarment). The Board agreed with the OAE that respondent's admissions of knowing misuse of client funds in the Ferlaino and Twesten matters warrant his disbarment.

Reciprocal disciplinary proceedings in New Jersey are governed by R.1:20-7(d), which directs that:

> (d) The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (1) the disciplinary order of the foreign jurisdiction was not entered;
>
> (2) the disciplinary order of the foreign jurisdiction does not apply to the respondent;
>
> (3) the disciplinary order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (4) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (5) the misconduct established warrants substantially different discipline.

On June 24, 1992, respondent signed a document resigning from the practice of law in Pennsylvania. In that document, respondent conceded that he was submitting his resignation because he could not successfully defend himself against the charges of professional misconduct set forth in the letters by the Pennsylvania

Disciplinary Board. Those letters charged respondent with the retention of $7,937.27 in the Ferlaino matter and of $93,000 in the Twesten matter. Exhibit D to the Motion for Reciprocal Discipline. On October 1, 1992, the Supreme Court of Pennsylvania accepted respondent's resignation and ordered that he be disbarred on consent. Exhibit A to the Motion for Final Discipline.

In reciprocal discipline cases, the Court has not hesitated to hold a New Jersey attorney to the strict standards in this state, even if they have received lesser discipline in the initiating state. See In re Tumini, 95 N.J. 18 (1983), and In re Keesal, 76 N.J. 227 (1978). Because of respondent's knowing misappropriation of client funds, the mandated result is disbarment. In re Wilson, N.J. 451 (1979). The Board unanimously so recommends. In reaching its decision to deviate from the Pennsylvania disciplinary action and to recommend respondent's disbarment, the Board also considered respondent's ethics transgressions in the matter that culminated in the recommendation for public discipline by the District IV Ethics Committee (DRB Docket No. 92-464). One member did not participate.

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

Dated: 9/21/93

By: Raymond R. Trombadore
Chair
Disciplinary Review Board