

Prose

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-306

IN THE MATTER OF :
THEODORE M. FIESCHKO, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 21, 1992

Decided: December 3, 1992

John McGill, III appeared on behalf of the Office of Attorney Ethics.

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 public discipline filed by the District VII Ethics Committee (DEC), arising out of a random compliance audit of respondent's trust and business accounts.

Respondent was admitted to the practice of law in New Jersey in 1982 and maintains an office in West Orange, Essex County.

By letter dated January 12, 1990, respondent was informed that an audit of his attorney records would be conducted on January 29, 1990. The audit was conducted by Mimi Lakind, an auditor with the Random Audit Program of the Office of Attorney Ethics (OAE).

Lakind discovered violations of R. 1:21-6 and RPC 1.15.¹ As set forth in the complaint and admitted by respondent, the following deficiencies were found:

- (a) A trust receipts book was not maintained.
[R.1:21-6(b)(1)].
- (b) A business receipts book was not maintained.
[R.1:21-6(b)(1)].
- (c) A trust disbursements book was not maintained.
[R.1:21-6(b)(1)].
- (d) A business disbursements book was not maintained. [R.1:21-6(b)(1)].
- (e) Deposit slips lacked sufficient detail to identify each item of deposit. [R.1:21-6(b)(1)].
- (f) A schedule of clients' ledger accounts was not prepared and reconciled quarterly to the trust account bank statement. [R.1:21-6(b)(8)].
- (g) A separate ledger sheet was not maintained, detailing attorney funds held for bank charges. [R.1:21-6(c)].
- (h) A separate ledger sheet was not maintained for each trust client. [R.1:21-6(b)(2)].
- (i) The trust account bank reconciliation prepared by the auditor showed that total trust funds

¹ Lakind's findings included unidentified funds of approximately \$6,000 in respondent's trust account (T5/1/92 15).

on deposit were in excess of total trust obligations. [R.1:21-6(c)].²

By letter dated March 14, 1990, respondent was notified that, as a result of the initial audit, a follow-up audit would be conducted on April 6, 1990 to determine his degree of compliance with the requirements of R.1:21-6 and RPC 1.15. During the follow-up audit, Lakind discovered that respondent was still not in compliance with the mandates of the rules. According to Lakind's testimony, she had instructed respondent how to comply with the requirements of the rules; nevertheless, although he had made some changes, respondent had failed to take adequate steps to bring his records into full compliance.

By letter dated April 27, 1990, respondent was notified that his records were "grossly incomplete" and in violation of the rules. He was further notified that, if he failed to bring his records into compliance on or before June 11, 1990, a petition would be filed with the Supreme Court seeking his temporary suspension. Respondent did not reply. By letter dated September 14, 1990, respondent was again asked to comply with the OAE's directives by November 1, 1990. Respondent again failed to reply.

On or about November 7, 1990, the OAE filed a motion for respondent's temporary suspension and for the imposition of monetary sanctions. Respondent was notified to appear before the

² At the DEC hearing, respondent stipulated to all three counts of the complaint: recordkeeping violations, willful recordkeeping violations and failure to cooperate with the OAE.

Board on November 28, 1990, the return date of the motion. Respondent failed to appear or to inform the OAE or the Board that he would not be appearing. The Board recommended that respondent be immediately temporarily suspended and that he be required to bear the costs of the audit.

On December 20, 1990, an order to show cause issued, requiring respondent to appear before the Court on January 2, 1991. The Court did not suspend respondent but, instead, required that Lakind conduct another audit on January 23, 1991. At that time, respondent advised the Court that he would shortly retain an accountant to bring his financial records into compliance (T5/1/92 38).

In her report dated February 14, 1991, Lakind summarized the results of her January 23, 1991 audit. She found that respondent had not hired an accountant and that he remained in violation of the rules. According to Lakind's testimony, respondent told her that his failure to hire an accountant was due to his inability to afford one (T5/1/92 22). Lakind also testified that respondent was extremely cooperative during their work (T5/1/92 25).

By letter dated February 22, 1991, the OAE forwarded Lakind's report to the Court. By letter dated March 7, 1991, the Clerk of the Court, notified respondent that he had until March 19, 1991 to present evidence that he had retained an accountant to correct his recordkeeping deficiencies; otherwise, he would be suspended from the practice of law.

By letter dated March 19, 1991, respondent advised the Clerk of the Court that he had retained an accountant to reconcile his trust account and maintain cash receipts and disbursements journals. The letter, Exhibit P-8, was received by the OAE on March 19, 1991. In light of this information, the Court did not suspend respondent.³

On January 10, 1992, respondent's accountant sent a letter to the OAE advising that, although he had been retained on March 19, 1991, a by-pass operation on June 10, 1991 prevented him from working for four months. The letter further explained the progress that had been made in bringing respondent's records into compliance with the rules. The accountant's letter did not certify that respondent was in compliance at that time.

* * *

On or about January 27, 1992, respondent was served with a copy of the formal complaint in this matter and was advised to file an answer. By letter dated February 28, 1992, the DEC secretary informed respondent that he had failed to file an answer, as required by R.1:20-3(i), and instructed him to do so within ten days.⁴ Although respondent received these letters, no answer was filed.

³ Although respondent had previously stated that he was unable to afford an accountant, he apparently was able to retain one. There is no evidence in the record of misrepresentation on this point; the accountant was retained by the time that respondent so indicated.

⁴ The Secretary's letter also informed respondent that the failure to answer would be a violation of RPC 8.1(b).

During the DEC hearing, respondent admitted that he failed to keep adequate records and that he had only a cursory understanding of the rules. He explained that, in 1987, his law practice had become focused on collection work⁵ and that financial difficulties, staffing problems and a growing workload kept him from tending to his recordkeeping responsibilities. Respondent testified that, at the time Lakind met with him, he had "about 4,000 files being maintained" (T5/1/92 28). He had no explanation for his failure to file an answer.

In its report, the DEC expressed its recognition and appreciation of respondent's candor and lack of dishonest conduct. However, these factors were deemed insufficient to mitigate respondent's failure to cooperate with the OAE, comply with its directives and reply to its letters. The DEC noted numerous opportunities granted to respondent to correct his recordkeeping failures and his lack of cooperation with the OAE. Accordingly, the DEC found violations of R.1.21-6(b)(1), (2) and (8), R.1:21-6(c) and (h), RPC 1.15(d) and RPC 8.1(b).⁶

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical

⁵ Respondent had been a sole practitioner since 1985.

⁶ Although not specifically found by the DEC, respondent also violated R.1:20-3(i), by failing to file an answer to the complaint.

is supported by clear and convincing evidence.

Factually, there is no dispute regarding the charges. Respondent conceded that his recordkeeping did not comply with R.1:21-6. Audits conducted in January and April 1990 established the improper recordkeeping practices of respondent. Of import in this matter is the fact that the audits did not reveal loss to any clients.

In In re Fucetola, 101 N.J. 5 (1985), a case quite similar to that now at bar, the attorney was publicly reprimanded for recordkeeping violations that did not lead to harm to any clients. Like respondent, Fucetola admitted his misconduct and had been previously disciplined.⁷

In In re Henn, 121 N.J. 517 (1990), the attorney was publicly reprimanded for lack of diligence, in violation of RPC 1.3, misrepresentations to and failure to keep his client informed, in violation of RPC 1.4(a), recordkeeping violations, in violation of R. 1:21-6, and failure to cooperate with the disciplinary authorities, in violation of RPC 8.1(b).

Respondent's lack of cooperation in this mater was extensive. He failed, on numerous occasions, to comply with the directives of the OAE. Also, although given several opportunities to do so and being made aware that he was in violation of the rules, respondent failed to file an answer to the formal complaint. An attorney has

⁷ Fucetola had been privately reprimanded in 1979. Respondent was publicly reprimanded, on April 28, 1992, for gross neglect and misrepresentation of the status of a matter, failure to inform his clients of the status of another matter and failure to set forth in writing the basis or rate of his fee. In re Fieschko, 127 N.J. 398 (1992).

an obligation to cooperate fully with the OAE, the ethics committee and its proceedings. In re Smith, 101 N.J. 568, 572 (1986); In re Winberry, 101 N.J. 557, 566 (1986); In re Gavel, 22 N.J. 248, 263 (1956). As noted by the Court in prior matters, "[d]isrespect to an ethics committee agent constitutes disrespect to this Court, as such a committee is an arm of the Court." In re Grinchis, 75 N.J. 495, 496 (1978). See also In re Kern, 68 N.J. 325 (1975). Respondent, in fact, failed to comply with the directives of the Court itself when he failed to obtain an accountant until two and one-half months after he assured the Court that he would do so.

In determining the appropriate quantum of discipline in this matter, the Board has considered that no client was harmed, that he did cooperate with Lakind during the audits and that he acknowledged his wrongdoing. The Board also took into account the demands on respondent of an understaffed, busy sole practice that encompassed 6,000-7,000 collection files since 1987. Respondent testified that he believes he is now in compliance with the rules (T5/1/92 39).

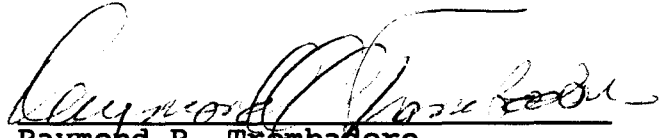
However, respondent's misconduct was considerable and protracted and public discipline is necessary. Accordingly, the Board unanimously recommends that respondent be publicly reprimanded. The Board further recommends that respondent's proctorship be extended for an additional two years.

In addition, a majority of the Board recommends that respondent be subjected to a psychiatric examination by a doctor approved by the Office of Attorney Ethics and that respondent

undergo whatever treatment is recommended. One member dissented from this portion of the recommendation. One member did not participate.

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

Dated: 12/3/1992

By: 
Raymond R. Trombadore
Chair
Disciplinary Review Board