

_____ :
IN THE MATTER OF :
RICHARD M. FOLEY, :
AN ATTORNEY AT LAW :
_____ :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 15, 1992

Decided: May 29, 1992

Robert Hicken appeared on behalf of the District IIIB Ethics Committee.

Respondent did not appear.¹

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

This matter is before the Board based upon a recommendation for public discipline filed by the District IIIB Ethics Committee (DEC).²

¹Chief Counsel advised the Board that the file in this matter had been sent to respondent via the Comet delivery service on March 17, 1992. No difficulty with the delivery had been reported. In addition, Board staff telephoned respondent's law office on the day prior to the meeting and left a message on his answering machine regarding the Board hearing. No return call was received.

²The DEC considered three matters. A fourth matter, District Docket No. IIIB-90-03E (The Reed matter) was not heard because the grievant mistakenly believed that the hearing had been postponed and failed to appear. The DEC decided that, out of fairness to respondent, it was necessary that the grievant be present at the hearing. Accordingly, the DEC determined not to proceed with that matter.

Respondent was admitted to the practice of law in New Jersey in 1974 and maintains a law office in Marlton, Burlington County. The facts of the three matters considered by the DEC are as follows:

The Stevens Matter (District Docket No. IIIB-90-07E)

On November 9, 1985, Daniel Stevens suffered personal injuries stemming from a one-vehicle accident. Less than one month later, Stevens retained respondent to represent him in the matter.³ During the course of the representation, Stevens visited respondent's office, made numerous telephone calls to him and sent two letters attempting to learn the status of his claim.⁴ On the occasions that respondent replied to Stevens' inquiries, he told him that the matter was pending. The same information was conveyed in respondent's letter to Stevens, dated July 7, 1987 (Exhibit S-1). In 1989, Stevens wrote to respondent and requested a copy of his file. Respondent complied with this request. Stevens testified that, even after he picked up the copy of his file, he still believed that respondent was pursuing the matter on his behalf. As of the date of the DEC hearing, Stevens was unaware of the status of his case. Respondent stated that he suspected that Stevens had another attorney representing him (T12/17/91 26).

Respondent stated that, during the time in question, he

³The contingent fee agreement was not executed until July 1987 (Exhibit S-2).

⁴The original of the May 24, 1990 letter was found in the file (Exhibit S-4).

experienced difficulty in contacting Stevens, who is disabled and was residing in a foster home. Respondent admitted that Stevens' case, which he categorized as "routine," was not handled properly (T12/17/91 16-17).

Although respondent filed an answer to the formal complaint in this matter, a letter from the DEC Secretary requesting information and a letter from the DEC investigator went unanswered.

The DEC determined that respondent's conduct violated RPC 1.1(a) and (b), RPC 1.3 and RPC 1.4(a). The DEC's report is unclear as to the finding on the fourth count of the complaint (violation of RPC 8.1(b)). The report states respondent was guilty of the charges in that count, but refers to respondent's misrepresentations to Stevens regarding the status of the case. The complaint did not charge respondent with a violation of RPC 8.4(c).

The O'Brien Matter (District Docket No. IIIB-90-16E)

In 1986 or 1987, Raymond O'Brien retained respondent to represent him in connection with a contract claim against R.J.P. Builders.⁵ O'Brien claimed that he was owed \$43,585.04 in commissions from the sale of houses in a real estate development. There were difficulties in locating the builder and O'Brien personally obtained information as to his whereabouts, which he provided to respondent. Respondent still did not proceed with his

⁵Prior to this time, respondent and O'Brien had a social and business relationship (T12/17/91 49).

attempts to locate the individual and serve him with the summons and complaint. In addition, O'Brien made numerous unsuccessful attempts, in person and by telephone, to learn the status of his claim. O'Brien also attempted, without success, to obtain his file from respondent. In approximately mid-1990, O'Brien retained another attorney, to whom the file was turned over. As of the date of the DEC hearing, that attorney was pursuing the matter on O'Brien's behalf (T12/17/91 41).

As with the Stevens matter, although respondent filed an answer to the formal complaint, other than providing the investigator with O'Brien's file, he supplied no information to the DEC.

* * *

In mid-1987, prior to the commencement of the contract matter, O'Brien asked respondent to represent him in connection with a divorce action. It was O'Brien's understanding that he had executed a quitclaim deed giving up his interest in the marital home for the benefit of his wife, in lieu of future financial obligations for spousal and child support (T12/17/91 39, 43). O'Brien also agreed to make payments on the mortgage, which was in arrears, to bring it up to date (T12/17/91 67). During the divorce proceeding, O'Brien's answer was stricken for failure to comply with discovery requirements. The record is silent as to whether O'Brien was aware that his answer had been stricken. According to respondent, O'Brien was not in a position to provide the requested information (T12/17/91 56). Respondent explained that, although a

consent judgment had been negotiated, opposing counsel had proceeded ex parte to obtain the order of divorce and the terms of a prior pendente lite order were carried forward (T12/17/91 56-57).

According to O'Brien, he became aware that the divorce was finalized and he continued to receive notices from the probation department to pay support. Thereafter, O'Brien contacted respondent who told him that he would take care of the matter (T12/17/91 38). O'Brien eventually received notice that he owed approximately \$38,000 in support.⁶ O'Brien testified that he never received copies of any orders or notices or letters from respondent (T12/17/91 37). Respondent, on the other hand, stated that, while O'Brien might not have received everything he should have, he did receive some communications (T12/17/91 56).

As part of the divorce proceeding, respondent, who had a social relationship with O'Brien's wife, had agreed to speak with her regarding O'Brien's personal property that was still in the marital home, including stock certificates. According to O'Brien, this was not done (T12/17/91 48). In his answer to the formal complaint, respondent stated that, he did, in fact, contact O'Brien's wife.

The DEC determined that respondent violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a), RPC 3.2 and RPC 8.1(b).⁷

⁶O'Brien testified that the situation has been resolved by his new attorney (T12/17/91 39).

⁷Although respondent was charged in the complaint with five counts of misconduct, the DEC report states: "[i]t's the determination of the panel that [respondent] is guilty on all four counts of unethical conduct" (T12/17/91 115). It is assumed that the DEC intended to find respondent guilty on five counts.

The Ware Matter (District Docket No. IIIB-90-12E)

On March 19, 1979, Charles Ware, Jr., son of the grievant in this matter, Charles Ware, Sr., was arrested with three other individuals for stealing hub caps. One of the other individuals confessed the crime and exonerated the three others. During the summer of 1979, grievant retained respondent to have his son's arrest record expunged. Over the following eleven years, there were numerous contacts between grievant and respondent regarding the expungement, at which time respondent indicated that he was pursuing the matter. Despite those assurances, respondent never completed the expungement on his client's behalf.

Respondent stated that he had prepared the necessary documents to have Ware's record expunged. However, the procedures for expungement had changed; the documents had to be filed in Superior Court, instead of in the municipal court. According to respondent, although he prepared the new documents, he was unable to complete them because Ware had left the area to attend school (T12/17/91 96-97, 102-103). In 1987, Ware met with respondent and signed a petition. At that time, Ware also told respondent that he had been arrested again. According to respondent, Ware requested that his father not be told about the trespassing incident, as a result of which respondent continued to tell grievant that he was pursuing the matter on his son's behalf (Answer, Exhibit W-1) Respondent

contended that he believed that the second arrest would prevent him from going forward with the expungement.⁸

The DEC found that respondent violated RPC 1.1(a), RPC 1.3 and RPC 8.4(c).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees with the conclusions of the DEC that respondent is guilty of unethical conduct. With regard to the charge of failure to cooperate with the ethics authorities, had respondent appeared before the Board, a finding of a violation of RPC 8.1(b) might not have been made. While it appears that respondent was not as cooperative as he might have been during the investigation of these cases, he did file an answer to the complaint, in which he admitted the allegations against him, and appeared at the DEC hearing, where he was cooperative. However, respondent's failure to either appear before the Board, to waive his appearance or even to return Board staff's telephone call reveals a contumacious and cavalier attitude toward

⁸It is interesting to note that, respondent's file (Exhibit W-3) contains an unsigned original of a letter concerning this matter from respondent to Ware, dated November 24, 1987, which refers to the second arrest. The letter states: [t]hat incident would not deprive you of your right to expunge the New Jersey arrest record, but the petition has to be accurate in all respects." The letter further states that respondent would obtain the expungement within 30 days. The file also contains a carbon copy of the letter.

the disciplinary system that has been weighed heavily against respondent.

Respondent also violated RPC 8.4(c), when he misrepresented the status of Ware's case. In In re Kasdan, 115 N.J. 472 (1989), the Court addressed this issue, stating that "...intentionally misrepresenting the status of lawsuits warrants public reprimand." Id. at 488. In addition to the misrepresentation, respondent is guilty of gross neglect, a pattern of neglect, lack of diligence, failure to communicate, failure to expedite litigation and lack of cooperation with the DEC and the Board. In the past, misconduct similar in nature has resulted in the imposition of a public reprimand. See In re Cervantes, 118 N.J. 557 (1990) (where the attorney was guilty of lack of diligence in two matters, failure to communicate in two matters and misrepresentation in one matter); In re Beck, 118 N.J. 561 (1990) (where the attorney failed to communicate and was guilty of a pattern of neglect in three matters) and In re Breingan, 120 N.J. 161 (1990) (where the attorney was guilty of a pattern of neglect in three cases, failure to communicate, lack of diligence in one case and failure to cooperate with the DEC. The attorney had been previously privately reprimanded.)

The aggravating factor in this matter is respondent's previous discipline: he has received both a private reprimand and a public reprimand for essentially the same misconduct as that now before the Board. He was privately reprimanded in 1981 for neglect and failure to communicate in one matter. In 1991, he was publicly

reprimanded for gross neglect in three matters. The Court ordered that he practice law under the supervision of a proctor for one year. While respondent purports to be full of apologies and mea culpas for his conduct, it is obvious that he has not learned from his mistakes or from the discipline meted out in his two prior bouts with the ethics system.⁹ Accordingly, the Board recommends that sterner discipline be imposed in the within matter.

In In re Ashley, 122 N.J. 52 (1991), the attorney was suspended for two years for gross neglect and a pattern of neglect in ten matters. In addition, Ashley made misrepresentations to clients, refused to return files, failed to return retainers in two cases, contrary to the orders of a bankruptcy judge and signed clients' signatures to bankruptcy petitions without their knowledge. Further, Ashley failed to cooperate with the ethics system. She had been placed on temporary disability-inactive status pending the outcome of the disciplinary matters against her. The Court further ordered that, upon reinstatement, Ashley practice under a proctorship for one year, prove her fitness to practice law

⁹Respondent's previous private reprimand was issued in 1981, clearly prior to the time of the within misconduct. While respondent's previous public reprimand was not issued until January 1991, after the time of the within conduct, the three matters considered at the time bear DRB docket numbers of 1988 and 1986. Accordingly, while he might not have yet been disciplined for his earlier misconduct during the time he represented Stevens, O'Brien and Ware, respondent clearly knew that his previous actions were under investigation and questionable at best.

and complete the Institute for Continuing Legal Education's Skills and Methods and Professional Responsibility courses.

In In re Ackerman, 95 N.J. 147 (1984), the attorney was suspended for two years for a pattern of neglect and delay, lack of communication with his clients, misrepresentation and failure to cooperate with the disciplinary system. The Court ordered that, prior to reinstatement, Ackerman prove his fitness to practice law. Ackerman had been previously publicly reprimanded.

In In re Rosenthal, 118 N.J. 454 (1990), a one-year suspension was imposed for a pattern of neglect in four matters, misrepresentations to clients, failure to refund a retainer and failure to cooperate in the disciplinary proceedings. Rosenthal had previously been publicly reprimanded for failing to act competently and to represent two clients zealously. His psychological difficulties were considered in mitigation of his misconduct.

In In re Grabler, 114 N.J. 1 (1989), the attorney was suspended for one year for gross neglect in four matters, failure to communicate and making misrepresentations to his clients in two matters. In addition, the attorney grossly neglected his trust and business accounting system.

In this case, the Board received a letter from a member of the hearing panel recommending that respondent be disbarred. Although recognizing that respondent does not intend to harm anyone and is

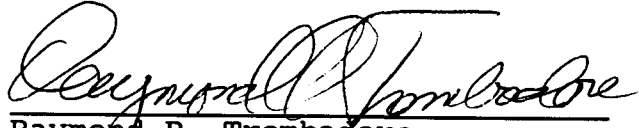
sorry for his conduct, that member believes that respondent will continue to practice law in a sloppy fashion with consequent injury to the public. That member noted that respondent has been practicing under the supervision of a proctor and even refused to take the latter's advice to obtain counsel in the ethics proceeding. The presenter in this matter also urged disbarment. The Board is of the opinion, however, that disbarment is not warranted in this case. True, respondent's practices are sloppy, he has harmed his clients and he has not learned from previous errors. Nevertheless, the purpose of discipline is not the punishment of the offender, but "protection of the public against the 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). While the Board recognizes the need to protect the public from further injury, it is convinced that this attorney is not beyond hope. Accordingly, a suspension of two years is unanimously recommended. In reaching this conclusion, the Board has taken into consideration respondent's statements regarding his wife's illness and the break-up of his partnership, as mitigating factors (T12/17 91 21-24, 105-112).

The Board further suggests that respondent be required to take ICLE's basic skills courses and that, upon reinstatement, respondent practice under the guidance of a proctor for a period of

two years. It is also urged that the Court direct the OAE to expedite all cases against respondent currently pending before the DEC. Three members did not participate.

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

Dated: 5/29/92

By: 
Raymond R. Trombadore
Chair
Disciplinary Review Board