SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-469

IN THE MATTER OF

JESSE JENKINS, III.

AN ATTORNEY AT LAW

Decision

Argued: March 20, 1997

Decided: June 3, 1997

Kenneth J. Cesta appeared on behalf of the District VB Ethics Committee.

Sheldon Schiffman appeared on behalf of the 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 VB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1992 and maintains an office at 334 Springdale Avenue, Suite 1, East Orange, Essex County, New Jersey.

The complaint alleged violations of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); RPC 3.5(b) (prohibited ex parte communications); RPC 4.1(a)(1) (truthfulness in statements to others); RPC 8.4(a) (violation or attempt to violate the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

* * *

While respondent has no prior discipline, he originally applied for admission to the New Jersey bar in 1978. That application was denied. On order for review of his application for admission to the bar, the Supreme Court held that respondent's consistent pattern of untruthfulness evidenced a lack of fitness to practice law. Application of Jenkins, 94 N.J. 458 (1983). Respondent failed to disclose information about his past in certifications to the Committee on Character. The omissions included an arrest in 1973 for larceny of an automobile and possession of burglary tools; an arrest in 1976 followed by charges of forgery and embezzlement; failure to disclose his involvement in at least four civil lawsuits to which he was a party; and discrepancies in respondent's employment history. Paralleling the actual conduct committed was respondent's lack of candor during the years 1979 to 1983 in his further certifications aimed at curing the original omissions. In the Court's words,

> Throughout the admission process Jenkins displayed a consistent pattern of untruthfulness. Jenkins' failure to disclose his criminal arrests and his civil actions and his misstatements concerning his employment record all reveal the same design. In each case, he denies the adverse event occurred. Confronted with evidence to the contrary, he offers an inadequate and unplausible excuse for not disclosing the incident. Finally, he displays contrition. The pattern is clear and unequivocal.
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> We do not accept Jenkins' explanations.
> [Id. at 468]

The Court denied respondent's admission to the bar, finding him unfit to practice law in New Jersey. After numerous attempts to have his admission reconsidered, respondent was unconditionally admitted to practice in New Jersey in 1992.

* * *

Some time in 1993, respondent was engaged to represent Joan Beale and Ivy Davidson in a probate matter venued in Essex County. Robert C. Davis ("the decedent") died intestate on January 10, 1993. Davidson claimed to be the decedent's sister, while Beale claimed to be the decedent's niece. In early 1993, respondent filed an application with the probate court to have Beale appointed as administratrix of the decedent's estate. The court, however, appointed another niece, Delores Alic, as administratrix. Apparently, at

some point in the contentious litigation surrounding the decedent's one million dollar estate, Alic claimed to be the decedent's daughter.

Respondent testified that it was this change in the case that precipitated his misconduct. Respondent indicated that, when Alic pressed her claim that she was the decedent's daughter, she shifted from her then-attorneys to the law firm of Lowenstein, Sandler, Kohl, Fisher & Boylan ("the Lowenstein firm"). Respondent felt that he was at a disadvantage, being opposed by such a large firm, and felt that he was not being fully apprised by them about aspects of the case. According to respondent, he was not told that the decedent's cremated remains in Florida were the subject of an action to which his clients should have been a party. He stated that the Lowenstein firm secured the cremains without his knowledge and that he was upset by that.

On June 10, 1994, during a hearing before the Honorable Alvin Weiss, J.S.C., the judge handling the probate matter, and the complainant in this case, respondent admitted that he wrote the decedent's name (i.e., Robert C. Davis) on a medical authorization form dated January 12, 1994 and presented it to the Montclair Community Hospital ("the hospital"), even though the decedent had died a year earlier. Respondent stated, however, that he placed an "S" before the signature to indicate that the decedent had not signed that exemplar of the authorization submitted to the hospital. He contended that the hospital was aware that the decedent had passed away and that he, therefore, could not have signed the authorization himself. The authorization form was accompanied by a letter from respondent dated January

17, 1994, which falsely represented that respondent was the attorney for the decedent and authorized the hospital to release the hospital records of the decedent to respondent.

The hospital released the medical records to respondent based on the false medical authorization.

Respondent also admitted to Judge Weiss that he was not the decedent's attorney, although he had stated that he was so on the medical authorization form and in the January 17, 1994 letter to the hospital.

The following is the relevant portion of the exchange between respondent and Judge Weiss:

THE COURT:	Whose signature -- whose signature is this on the medical authorization?
MR. JENKINS:	I signed that Your Honor, I signed an S and then I signed Mr. Davis' name.
THE COURT:	How could you sign Mr. Davis' name?
MR. JENKINS:	I signed and [sic] S before it, I didn't sign his name as such in terms of fraud Your Honor, I signed an S before that.
THE COURT:	Were you his attorney?
MR. JENKINS:	No sir I was not. No Your Honor.

[Exhibit VB-1 at 10]

Shortly thereafter, respondent learned that there were some tissue samples of the decedent in storage at the hospital, the result of an operation performed on him in 1984. Respondent again visited the hospital in an effort to obtain the samples in order to have DNA

tests performed on them. He hoped that such tests could be used to disprove Alic's claim to the decedent's estate as his daughter.

The hospital flatly refused to turn the tissue samples over to respondent. According to respondent, the hospital had been contacted by someone at the Lowenstein firm who was very upset that medical records had been released to respondent. It was at this time, in March 1994, that respondent sought an emergent order to obtain the samples.

According to respondent, he feared that something could happen to the samples if he did not secure them immediately. When pressed for an explanation of his sense of urgency, respondent suggested that the samples could have been lost or damaged prior to proper testing. Respondent thought it urgent to obtain the samples for DNA testing purposes.

On March 23, 1994, respondent went to the Essex County courthouse in search of a judge willing to sign an order to obtain the tissue samples. There is no indication in the record that Judge Weiss was available or unavailable to see respondent on that day. The first two judges respondent saw told him to see the judge assigned to emergent matters. Thus, respondent found his way to the Honorable Stephen E. Mochary, J.S.C., the judge on emergent duty.

Respondent testified as follows:

> I wasn't aware that I was supposed to go to Judge Weiss, I'm aware of that now, when the judge has a matter. And at the time, Judge O'Neil had the case and it was switched to Judge Weiss. And I thought if I went to the emergent judge, which I was told to go to, that that was the right personnel to go to sign my order.

[T39][1]

The only record of what transpired in Judge Mochary's chambers is respondent's testimony taken at the DEC hearing and at a deposition ordered by Judge Weiss after respondent's transgressions came to light. When questioned about notice of the order to the Lowenstein firm and other aspects of the meeting in chambers, respondent testified as follows:

> I was concerned with the way the case was going and I was overwhelmed by things that the Lowenstein firm was doing, so I figured once I was able to get my hands on the records, I would give it to them. Nor did I get any notice when they submitted an application to ascertain Mr. Davis's cremains. So I figured that, you know, maybe that was the way to go, and they'll tell me, as I told them later on that I have something. And I informed them at that time after I had it, as they informed me of the recovery of the remains of the decedent when they brought an application in Florida.
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> * * *
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> I met with Judge Mochary personally in chambers, in camera, and I gave him everything, and he questioned me extensively about the application, and he signed it.
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> [T39-40]

[1] T refers to the transcript of the June 6, 1996 DEC hearing.

Respondent testified that, while the discussion of the case with Judge Mochary covered a number of issues, the judge did not ask respondent if he had served his order to show cause[2] on his adversaries, or wether or not the case was contested. 6/27/94 T101[3].

Respondent then testified that Judge Mochary knew that no brief or affidavits had been submitted with the order to show cause and explained that he did not try to mislead the judge by stating that briefs and affidavits had been filed with the court:

> And in my inexperience, I thought that was just language, but I understand it's much more than that when I submit that to parties. However, I met in camera with Judge Mochary. I never submitted him any documents other than to be examined by him, and he was well aware that there were no briefs or affidavits, there were only oral arguments.
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> Judge Weiss gave me a scolding and told me that I was supposed to [submit all orders to him], so that's the first time I became aware. And since then, it's become crystal clear to me that when a judge has a matter, that judge must be approached regardless of what kind of matter it is, because it's in essence, his or her case. So that's the person that you must see on any kind of order once a judge is assigned to a case.
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> [T41]

* * *

[2] There were numerous deficiencies that distinguish respondent's papers from a true order to show cause. Respondent's was simply an order with supporting documents such as the decedent's birth and death certificates and a copy of the Uniform Anatomical Gift Act.

[3] 6/27/94 T refers to the transcript of respondent's deposition taken in the probate matter on June 27, 1994.

Respondent admitted to a violation of RPC 4.1(a)(1) (knowingly making a false statement of material fact to a third person), as well as to a violation RPC 3.5(b) (prohibited ex parte communications). In addition, the DEC found a violation of RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exits) and RPC 8.4(d) (conduct prejudicial to the administration of justice) for respondent's non-compliance with R. 1:6-4, which requires that a copy of all motion papers be filed with the judge assigned to the matter; RPC 8.4(a) (violation or attempt to violate the Rules of Professional Conduct); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) for respondent's action in obtaining evidence by means of a forged hospital authorization.

Noting respondent's admission of wrongdoing and lack of harm to any party in the underlying action, the DEC recommended the imposition of a reprimand.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of ethical misconduct is fully supported by clear and convincing evidence.

The Medical Authorization

Respondent admitted that his cover letter to the hospital, dated January 17, 1994, falsely stated that he represented the decedent and that he was authorized to request the release of the decedent's medical records. Respondent never represented the decedent, maintaining at the DEC hearing that the reference to the representation was an error and that he had overlooked it when signing the letter. Respondent's explanation was simply not credible, given that he created the medical authorization. It is more likely that he crafted the letter as carefully as the authorization form.

Respondent also admitted writing "Robert C. Davis" on the signature line of the medical authorization form, despite his knowledge that the decedent had passed away over one year earlier. Respondent argued at the DEC hearing that placing an "S" before the signature was meant to indicate that he was not signing as Mr. Davis. While the "S" might have saved respondent from an outright forgery charge, it does not change the fact that respondent used subterfuge to compel the hospital to release the decedent's records. An "S" before a signature on a document indicates to the world that this document is an unsigned copy of a signed original. Respondent violated RPC 4.1(a) (truthfulness in statements to others) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) by submitting false information to the hospital about respondent's representation of the decedent and by inducing the release of medical records by writing decedent's name on it. Respondent's contention that the hospital knew that the decedent had passed away and, that, therefore, the decedent could not have signed it, was not persuasive. The hospital could not

be expected to see beyond respondent's misrepresentation and false signature before releasing documents. Knowing that respondent is an attorney, the hospital took him at his word. The DEC was correct to find a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice) as was alleged in the complaint. Respondent testified that the Lowenstein firm did not deal fairly with him and withheld information from him. It appears that respondent was more concerned with getting even for those perceived wrongs than with conducting himself in a professional manner. There is nothing in the record to suggest that the Lowenstein firm did anything wrong in the probate case. And even if that were not the case, respondent had an obligation to behave responsibly and ethically. By creating the false medical authorization and the impression that he represented the decedent in the case, respondent undermined the orderly process of discovery, thereby prejudicing the administration of the case. The Board found that respondent's misconduct in this regard was a clear violation of RPC 8.4(d)

Respondent was also charged with a violation of RPC 8.4(a) (attempt to violate the Rules of Professional Conduct). While the DEC did not specify the factual basis for its finding of a violation, there is ample evidence of a violation in the record. Respondent admitted in his deposition, taken in the underlying matter, that he visited the hospital to attempt to obtain tissue samples of the decedent. According to his own testimony, after respondent received the medical records from the hospital, he learned that the hospital had tissue samples of the decedent. He visited the hospital and requested their release based on the phony authorization form previously supplied by him. It is of some consequence that the

hospital refused to turn over the tissue samples; the Board found that respondent's attempt to secure them under such false pretenses was a violation of RPC 8.4(a).

The Mocharv Order

With regard to respondent's alleged misconduct in obtaining the emergent order, the only testimony in the record is respondent's own. There is no testimony or evidence to contradict respondent's version of events.

The alleged violation of RPC 3.4(c) (knowing disobedience of an obligation under the rules) was triggered by R. 1:6-4, which requires parties to file a copy of all pleadings with the judge assigned to the case. The DEC erred in finding a violation in this context, as the rule requires knowledge by the attorney. In this case, respondent repeatedly asserted that he did not know that he was obligated to present Judge Weiss with his order and that, in fact, he was told to go to the emergent judge by the first two judges he visited. Certainly the facts, as presented by respondent, warranted more probing questions from the DEC on this issue. What is more, respondent was not asked if the judge assigned to the case, Judge Weiss, was available or unavailable to entertain respondent's order to show cause on March 23, 1994. In order to find that respondent was "knowingly" disobedient, in violation of RPC 3.4(c), it must be established that not only was respondent "judge-shopping" in order to avoid filing his order to show cause with Judge Weiss, but that Judge Weiss was available on that day to hear the matter. The record is silent on both issues. On that basis, the Board was unable

to find that respondent's actions rose to the level of misconduct contemplated by RPC 3.4(c) and determined to dismiss the charge.

Likewise, in order to support a violation of RPC 3.5(b) (prohibited ex parte communications), knowledge of the availability of Judge Weiss is critical. In essence, unless respondent was "judge-shopping" with the knowledge that he was supposed to file his emergent application with Judge Weiss (which cannot be established on this record) while Judge Weiss was available to hear the matter on that day (which similarly cannot be established), respondent's communication with Judge Mochary was not improper. Again, the scanty record does not support a finding of misconduct in this regard. Indeed, respondent's sense of urgency, although misguided, was shared by Judge Mochary, who signed the order authorizing the release of the tissue samples to respondent. It was done off the record, without oral argument or the presence of opposing counsel. Judge Mochary apparently did not ask respondent if he served his adversaries with the order to show cause or if the probate matter was contested. According to respondent, the judge asked about the reference to briefs and affidavits contained in the form of order; respondent assured him that the reference was an error and that none had been filed. The record does not explain why the reference to briefs and affidavits was not deleted from the form of order prior to its entry. At most, respondent committed a technical violation for not having immediately filed the order to show cause with the clerk of the chancery division or Judge Weiss, after the order was signed. Respondent testified, however, that he thought that Judge Mochary's chambers

had done so, as is the normal practice. For these reasons, the Board was unable to find a violation of RPC 3.5(b) and determined to dismiss the charge.

The only remaining issue is that of discipline. In In re Delventhal, 124 N.J. 266 (1991), the attorney was suspended for three months for misrepresenting to a title company holding escrow funds that an order dismissing a complaint for failure to answer interrogatories was a final order authorizing the release of the escrow funds to his client. The attorney in Delventhal did not resort to a false document to further his scheme, as this respondent did, making respondent's misconduct all the more egregious. In both cases, each attorney characterized a document to be something other than what it truly was, resulting in detrimental reliance by a third party. See also In re Kernan, 118 N.J. 361 (1990) (where the attorney received a three-month suspension for failing, in his own matrimonial matter, to inform the court that he had fraudulently transferred property for no consideration, which property he had previously certified to the court as an asset. The Supreme Court found that Kernan "blatantly attempted to defraud both the court and his wife." Moreover, Kernan knowingly made a false certification when he failed to amend his list of assets before the court. Kernan had a prior private reprimand).

Respondent's misconduct was serious. His creation of the medical authorization bordered on forgery. His cover letter to the hospital misrepresented his position in the case. The Board, like the DEC, took respondent's admissions of wrongdoing and relative lack of experience at the time into consideration in making its determination. However, respondent spent nine years (after the Court's 1983 denial of bar admission) seeking to show that he was

sufficiently rehabilitated to practice law in this state. The Board concluded that respondent should have had a heightened awareness of his professional and ethical duties precisely because of his past transgressions, which in and of themselves, were of a very serious nature.

Given the serious nature of respondent's tortuous bar application process and the somewhat extraordinary chance given to respondent when finally admitted to practice law in 1992, the Board unanimously determined to impose a six-month suspension with the further requirement of a proctor for a period of two years, upon reinstatement. Two members did not participate.

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

Dated: 6/3/97

LEE M. HYMERLING
Chair
Disciplinary Review Board