SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-088

IN THE MATTER OF
DOUGLAS R. SMITH,
AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 12, 1993

Decided: August 3, 1993

David Chazen appeared on behalf of the District IIA Ethics Committee.
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 IIA Ethics Committee (DEC). The formal complaint charged respondent with violations of DR 1-102(A)(1), (4) and (6), DR 5-104(A), DR 6-101(A)(1) and (2), DR 7-101(A)(1), (2) and (3), RPC 1.1(a) and (b), RPC 1.3, RPC 1.4, RPC 1.5, RPC 1.8(a) and RPC 8.4(a) and (c).[1]

Respondent was admitted to the practice of law in New Jersey in 1974 and maintains an office in Fair Lawn, Bergen County.

Respondent was charged with six counts of misconduct in connection with his representation of one client, Lufti G. Mansoor. The facts of each count are as follows:

[1] The Rules of Professional Conduct replaced the Disciplinary Rules effective September 1984. Respondent's representation of the grievant began before that time. Accordingly, both rules apply.

COUNT ONE: The First Fidelity Bank Matter

In the Spring of 1980, respondent was retained by Mansoor to institute suit against First Fidelity Bank to reform the terms of a mortgage. According to Mansoor, he had received a letter from the bank containing certain terms and conditions. Mansoor considered the letter to be a mortgage commitment. Approximately sixty days prior to closing, the terms were modified to Mansoor's disadvantage. For business reasons, Mansoor proceeded with the transaction. Mansoor's intention was to subsequently sue the bank to compel compliance with the original commitment letter.

The matter was discussed between Mansoor and respondent on at least a quarterly basis, at which time respondent informed Mansoor that the suit was progressing (1T 8).[2] In fact, respondent never filed suit against the bank and, for the next eight years, misled Mansoor into believing that the lawsuit had been filed and that a judgment had been entered. Respondent told Mansoor that the case was on appeal (1T 9).

In October 1987, Mansoor retained new counsel, William J. McNaughton, Esq. After several requests by McNaughton, on or about January 20, 1988, respondent turned over to him the file in this matter. McNaughton saw nothing in the file to suggest that suit had been filed (1T 136).

During a telephone conversation on January 26, 1988, respondent informed Mansoor that a judgment had been obtained

[2] 1T refers to the transcript of the hearing before the DEC on October 28, 1992. 2T refers to the transcript of the hearing on October 29, 1992.

against the bank. According to respondent, Mansoor had previously requested that he make that statement to mislead a third party who was listening to the conversation, presumably about Mansoor's assets (2T 14-17). In a later telephone conversation with Mansoor, on February 2, 1988, respondent stated that there was no judgment in that matter or in the Compugraphics Matter (See discussion of Count Two, infra) (1T 8, 2T 18). Respondent testified that the latter conversation was in accordance with what he had told Mansoor all along. Respondent also testified that he later had a meeting with Mansoor during which they discussed the fact that respondent had lied for him. Respondent testified that he "was extremely uncomfortable that that had been done, and that's when we basically terminated our relationship" (2T 15).

Respondent stated that the reason that he never took action against the bank was that, although he and Mansoor had numerous discussions on the matter over at least a five-year period, they "never had that final communication that said let's go ahead and institute the lawsuit" (2T 13, 19). In addition, respondent explained that he believed that Mansoor would have had a difficult time prevailing in the suit (2T 14). He also testified that he had informed Mansoor all along that there was no judgment entered or complaint filed in this matter or a complaint filed in the Compugraphics Matter, infra, (2T 53).

The DEC found that respondent's behavior constituted gross neglect, in violation of DR 6-101(A)(1) and DR 7-101(A)(1)(2) and (3); that he had failed to keep Mansoor reasonably informed and

that his deceit and misrepresentation violated DR 1-102(A)(1),(4) and (6); and that he also had violated RPC 1.1(a), RPC 1.3, RPC 1.4 and RPC 8.4(a) and (c), the superseding rules, because his misconduct had extended beyond September 10, 1984.

COUNT TWO: The Compugraphics Matter

In or about 1982, Mansoor consulted with respondent about a suit against Compugraphics for anti-trust violations. Compugraphics was a supplier of computerized typesetting equipment in Mexico and South America. Mansoor's company would sell spare parts from Compugraphics to buyers in Mexico and Venezuela. In 1982, Compugraphics informed Mansoor that it would no longer provide him with parts.

According to Mansoor, respondent advised him that he had sued Compugraphics and obtained a judgment against it for $35,000, which did not include treble damages. Respondent also told Mansoor that he was having difficulty locating assets on which to place liens (1T 15). After McNaughton obtained the file in 1988, he discovered that no suit had been filed. As noted in the First Fidelity Matter, supra, respondent later admitted to Mansoor that no suit had ever been filed.

Respondent testified that, although he and Mansoor had discussed filing suit against Compugraphics, he had warned Mansoor that it would be difficult to prevail. He stated that Mansoor was aware that he, respondent, did not believe that litigation was a wise choice and was further aware that suit had not been filed.

The DEC found that respondent had violated DR 6-101(A)(1), DR 7-101(A)(1)(2) and (3) and DR 1-102(A)(1)(4) and (6).

COUNT THREE: The Internet/Cooper Matter

In or about 1985, Mansoor instructed respondent to initiate suit against his former employee, Lillian Cooper, and Internet, a California corporation, for alleged violation of a non-compete clause in a contract between Mansoor and Cooper. Respondent informed Mansoor that a California law firm had been hired to pursue the matter, that suit had been filed, and that a default judgment had been entered. That information was apparently not accurate. By letter dated April 21, 1987, respondent informed Mansoor that Internet had filed for bankruptcy and that a default judgment had been entered against Internet subsequent to the bankruptcy filing. The letter further advised that he had instructed California counsel to proceed against Cooper (Exhibit C-2). That information was untrue. According to McNaughton, no lawsuit was filed in Mansoor's behalf and Internet was not bankrupt (1T 139-141).

Respondent testified that what he reported to Mansoor was his understanding of the status of the matter at that time (2T 79). He stated that he had received information from the California law firm that Internet was filing for bankruptcy and they "basically allowed the matter to expire" (2T 35). Respondent also stated that Cooper could not be located (2T 35). Respondent never asked for a copy of the judgment or made written inquiry about the bankruptcy

status (2T 77).

The DEC found that respondent had violated DR 6-101(A)(1) (RPC 1.1(a)), DR 7-101(A)(1)(2) and (3) (RPC 1.3) and DR 1-102(A)(1), (4) and (6) (RPC 8.4). (Respondent's conduct post-dated the DRs and, accordingly, the RPCs apply.)

The DEC also found that respondent's misconduct in the First Fidelity Bank, Compugraphics and Cooper/Internet matters, constituted a pattern of neglect, in violation of DR 6-101(A)(2) and RPC 1.1(b).

COUNT FOUR: The Condemnation Proceeding

In or about mid-1985, Mansoor asked respondent to prepare documents in connection with an impending condemnation by the Department of Transportation of a section of one of Mansoor's properties. According to Mansoor, respondent advised him that he had taken action to obtain necessary releases from the banks holding the mortgages, but that the banks were delaying compliance. Although respondent allegedly pursued the matter for over two and one-half years, it was never completed. Mansoor's subsequent attorney, McNaughton, resolved the matter within four months.

Respondent testified that he had not pursued the matter because Mansoor instructed him "to just let it go," rather than take action (2T 60).

Respondent was charged in this matter with violations of DR 6-101(A)(1) (RPC 1.1(a)), DR 1-102(A)(1), (4) and (6) (RPC 8.4) and DR 7-101(A)(1)(2) and (3) (RPC 1.3). The DEC found a lack of clear

and convincing evidence of a violation of DR 6-101(A)(1) and DR 7-101(A)(1), (2) and (3). The DEC questioned whether the delays alleged in the complaint constituted gross negligence or were, instead, a product of respondent's belief that Mansoor wanted him to "sit out" and wait for a better bargaining position. The DEC did not find clear and convincing evidence of a violation of DR 1-102(A)(1), (4) or (6).

COUNT FIVE: Failure to Provide a Written Retainer Agreement

Beginning in 1979, respondent and Mansoor had an ongoing business relationship that encompassed numerous matters. Respondent and Mansoor and their families had previously established a social relationship. New matters were instituted regularly and, according to respondent, he had over one hundred files for Mansoor (1T 244). Respondent and Mansoor did not enter into written fee agreements for each matter. Rather, Mansoor paid respondent an annual retainer, plus additional fees for work such as real estate closings. According to Mansoor, he paid respondent $40,000-$45,000 (1T 22). McNaughton testified that, although respondent was asked to provide an accounting of all fees charged, none was provided (1T 152-153).

Respondent described the financial arrangement between the two as follows:

> . . . We had a very clear understanding of how he would be billed, and that understanding is as follows: Mr. Mansoor paid the first retainer in 1979. He subsequently paid a number of retainers on an irregular basis for the next seven or eight years. They were not billed annually. They were billed when the retainer was

> exhausted. The agreement was that Mr. Mansoor would essentially have unlimited access to my office and my advice, either at home, or in his home, or in my office, or by telephone, or by any other way that was necessary to provide general counseling and advice in his widespread business interests.
> [1T 225].

Although there appeared to be some questions in the record as to certain disbursements respondent made, there were no allegations or findings made against respondent in that regard.

Respondent was charged with a violation of RPC 1.5. The DEC found that, because respondent represented Mansoor on a regular basis, a written retainer agreement was not required under RPC 1.5(b). Accordingly, this count was dismissed.

COUNT SIX: The Loan to Respondent

In April 1984, Mansoor lent respondent $25,000 from Mansoor's retirement plan. Respondent never advised Mansoor to seek independent counsel in connection with the loan (2T 47). In addition, Mansoor never consented, in writing, to entering into a business transaction with respondent. Although a note was eventually prepared, it was not provided to Mansoor until some time after the loan had taken place. The terms of the loan were such that the loan was secured by a second mortgage on respondent's house. According to respondent, the mortgage was not to be recorded until respondent defaulted on the note or was unable to provide payment upon demand (2T 50). With regard to the filing of the mortgage, Mansoor stated: "I believe that you [respondent] were going to file a mortgage on the property. It wasn't done at

the time I loaned you the money, but I believe you were going to follow through on that" (1T 104). According to McNaughton, the mortgage was recorded in or about March 1988 (1T 157). The money was repaid by respondent in May or June 1988 (1T 130, 158).

Respondent testified that Mansoor frequently lent money to other individuals without documentation (2T 67).

The DEC found that respondent violated DR 5-104(A) and RPC 1.8(a), in that respondent never advised Mansoor to seek independent counsel regarding the loan and Mansoor never agreed, in writing, to the arrangement. The DEC noted that, although respondent did not take advantage of Mansoor, RPC 1.8(a) does not require actual detriment to the client to find a violation.

A great deal of emphasis in this case was placed on the credibility of the witnesses. The DEC found Mansoor to be extremely credible, particularly in light of the documentation he was able to provide. Noting respondent's litigation background, the DEC drew negative inferences from his failure to produce documentation and/or witnesses to substantiate positions he took in his defense. In its report, the DEC stated:

> A primary example of the above paragraph is as follows: Respondent's defense to Count Three of the Complaint wherein it is alleged he sent correspondence to Mansoor advising that default judgment had been entered against Internet is that the California firm misinformed Respondent as to the actual status of the case. Respondent took absolutely no efforts nor referred to any efforts to obtain either witnesses from California or even Affidavits from attorneys in California confirming Respondent's allegation that he was misinformed by the firm.
>
> [Panel Report at Paragraph 27].

As to Mansoor's contention that respondent had misled him about the judgments, respondent testified that he had never represented to Mansoor that he had obtained a judgment in the First Fidelity Bank and Compugraphics matters or, for that matter, that he had even filed a complaint in both matters. Respondent conceded, however, that, on one occasion, he misrepresented the existence of the judgments during a telephone conversation with Mansoor, in which a third party also participated as a listener. According to respondent, he did so at Mansoor's request; because respondent had advised Mansoor that, in a way, judgments constitute assets, Mansoor's intention was to mislead that third party into believing that his assets were, in fact, greater than they were.

Further, the DEC found that respondent's testimony regarding Mansoor's bizarre behavior was rebutted by the testimony of other witnesses.

Although the issue was not pursued by the presenter or the DEC, according to Mansoor, respondent stated that "he didn't have a lot of money, but if there was some way he could avoid the filing of that ethics complaint, that he would do so" (1T 129).

A malpractice suit filed by Mansoor against respondent resulted in a $175,000 settlement (1T 26).

CONCLUSION AND RECOMMENDATION

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 fully supported by clear and convincing evidence. The DEC determined that respondent was guilty of gross neglect, lack of diligence and a pattern of neglect in three matters. In addition, he entered into a business transaction with a client, without advising the client to seek independent counsel and without obtaining the client's consent in writing. He also made misrepresentations to Mansoor regarding the status of his matters.

The Board agrees with the DEC's dismissal of the "retainer matter," finding that Mansoor was respondent's long-term client and that a written retainer was, therefore, not mandated by RPC 1.5. The Board also agrees that clear and convincing evidence has not been presented to sustain the charges of gross negligence and lack of zealousness in count four, the "condemnation matter." However, the Board notes that a reasonably prudent attorney would have placed something in writing to reflect his understanding of the client's wishes. Respondent's actions were not in the best interests of either his client or himself.

In the past, conduct similar to respondent's has merited a one-year suspension. See In re Grabler, 114 N.J. 1 (1989) (gross neglect in four matters, failure to communicate in two matters, misrepresentations regarding case status to two clients and

recordkeeping violations); In re Jenkins, 117 N.J. 679 (1989) (gross neglect in two matters, misrepresentation of the status of cases to clients; disregard for disciplinary process considered as aggravation); In re George, ___ N.J. ___ (1989) (gross neglect in four matters, pattern of neglect, improper taking of an acknowledgment, failure to maintain proper trust and business account records; failure to cooperate with disciplinary authorities considered in aggravation) and In re Rosenthal, 118 N.J. 454 (1990) (pattern of neglect in four matters, misrepresentations to clients, failure to cooperate with disciplinary authorities; prior public reprimand).

In addition to the violations present in the above cases, however, respondent violated RPC 1.8, in that he entered into a business relationship with a client without advising the client to seek independent counsel. See In re Chase, 68 N.J. 392 (1975) (where an attorney was publicly reprimanded for lending the funds of one client to another without informing the former of the relationship and without the disclosure required under the disciplinary rules) and In re Hughes, 114 N.J. 612 (1989) (where an attorney received a public reprimand for his involvement in a business relationship with his paramour, from whom he borrowed a substantial sum of money to finance a business venture, without advising her to seek independent legal counsel).

An important factor in determining the appropriate quantum of discipline in this matter is the length of time spanned by respondent's derelictions. In the First Fidelity Bank Matter,

respondent misrepresented to Mansoor for eight years that he had pursued the matter and that a judgment had been obtained. Similarly, respondent's misrepresentations in the Compugraphics matter, spanned six years.

Respondent demonstrated no remorse for his actions but, rather, invented very creative excuses for his misconduct. For example, in the Cooper/Internet matter, respondent testified that he misled Mansoor because he himself had been misled by the California law firm handling the matter. Although he testified that he spoke with individuals at the California firm, respondent presented no evidence of his communications with that firm and, indeed, did not even produce efforts to obtain evidence on this count. Respondent claimed that, in the First Fidelity Bank and Compugraphics matters, he misrepresented the status of cases on his client's request to mislead a third party. If Mansoor's version of these facts is believed, then respondent made a misrepresentation to his client. If respondent's version of the facts is believed, then he made a misrepresentation to a third party. In either scenario, respondent is guilty of unethical conduct.

As noted above, credibility of witnesses was a key factor in this matter. Mansoor was found to be an extremely believable witness, even in light of the testimony of respondent's witnesses. Rather than produce evidence in his defense, respondent presented witnesses who testified as to Mansoor's personality and litigious history. Their testimony was not directed toward rebutting the allegations and testimony against him but, rather, to attacking

Mansoor's credibility. However, even accepting that testimony as true, the events narrated are not relevant to whether Mansoor was entitled to adequate representation by respondent. It is significant that respondent did not even produce his former law partner, Irwin H. Tessler, Esq., although he was apparently involved in several of the matters in question. This lack of relevant evidence further diminishes respondent's claims.

Accordingly, a four-member majority of the Board recommends that respondent be suspended for a period of one year. Two members dissented: one member voted for a two-year suspension, while the other member believed that respondent should be disbarred. One member did not participate.

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

Dated: 8/3/1993 By: ____________________

Raymond R. Trombadore
Chair
Disciplinary Review Board