Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-074

IN THE MATTER OF

MARCIA S. KASDAN,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 20, 1992

Decided: June 22, 1992

Allan P. Browne appeared on behalf of the District IIA Ethics Committee.

Dominic J. Aprile appeared on behalf of respondent.

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

This matter was before the Board based upon three recommendations for public discipline filed by the District IIA Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1978. Effective July 17, 1989, she was suspended for three months. She has not yet been reinstated.

1. The Davilla Matter (II-A-90-2E)

On July 4, 1989, approximately two weeks before her three-month suspension in New Jersey was to begin, respondent sought a stay of her suspension in order to complete her representation of

certain clients, including Ms. Davilla. On July 11, 1989, the Court denied her application for a stay. On July 17, 1989, the suspension took effect.

At the DEC hearing, respondent stipulated that, on July 25, 1989, she appeared before Judge Culthau of the Superior Court of Middlesex County to argue a change-of-custody motion in the Davilla case. Thereafter, on January 8, 1990, she and her adversary met with Judge Culthau to help resolve certain ambiguities arising from the transcription of the tape of the court proceedings of July 25, 1989. At no time from July 17, 1987 through January 8, 1990, did respondent tell her adversary or the judge of her suspension (C-1 in evidence). Respondent testified that she verbally advised her client of the suspension after the July 25, 1989 court appearance. She acknowledged that she never gave prompt written notice of the suspension, as required by Guideline No. 23, provided to her with the Court's order of suspension.

At the DEC hearing, respondent testified as follows:

> I was in error, I regret sincerely that I made this error. And upon realizing the extent of my error, which I do and I am sorry to have to appear before you in this manner, I tried to look for help. I realized that it was not acceptable to be a professional and not understand the limitation of that which you are allowed to do. And I understood the limitations, but somehow or other I allowed what I perceived as the needs of Miriam Devila [sic] and her baby infant son to interfere

> with the duties that I had sworn to uphold in the Court.
>
> [1T20][1]

Respondent testified that she sought psychotherapy after this incident. However, she did not submit any report to the DEC or provide expert testimony to show any psychological condition causally related to the charged conduct. The DEC found that respondent had not met her burden of proving psychological problems that excused or mitigated the charges. The DEC concluded that respondent had violated RPC 3.3(a) and 3.4(c), by making a false statement of material fact to the court through her appearance as an attorney and by knowingly disobeying an obligation under the rules of a tribunal. The DEC was particularly disturbed by the fact that respondent continued to represent Ms. Davilla in the face of the Court's unambiguous denial of respondent's request for a stay of her suspension. However, the DEC did not find that respondent's failure to adhere to Guideline No. 23 -- by not properly informing her client, her adversary and the court of her suspension -- was a separate violation of the Rules of Professional Conduct beyond the rules already charged.

2. The Wolkoff Matter (II-A-89-36E, II-A-90-4E)

In this matter, respondent stipulated that she failed to give notice of her suspension to either opposing counsel or the judge assigned to hear the matter and that she failed to act with candor in advising the court or her adversary of her suspended status, in

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[1] 1T refers to the transcript of the DEC hearing of April 8, 1991.

violation of RPC 3.3(a)(1) and RPC 3.4(c) (C-1 in evidence). Respondent, however, denied that she represented Eugene Wolkoff while suspended.

The presenter called opposing counsel, Jeffrey Weinstein, and his associate, Cathy M. Abrams, to testify about their contact with respondent after her suspension on July 17, 1989. Mr. Weinstein testified that he talked with respondent about the child visitation rights and about the amount of support (1T75). Mr. Weinstein then produced a letter to Judge Boyle dated July 21, 1989, signed by respondent, in which she enclosed a proposed partial order confirming the court's decision of that date (C-6 in evidence). Mr. Weinstein had been sent a copy of the letter as opposing counsel. In addition, Ms. Abrams wrote a letter to respondent on August 2, 1989, complaining that she had not yet received a required check from respondent's client. At the bottom of that letter, respondent handwrote a response, enclosed her client's check, and mailed it back to opposing counsel (C-10 in evidence).

Respondent called an attorney, Judith Fields, to testify that she had taken over the Wolkoff matter at the time of respondent's suspension. Ms. Fields testified that she argued the motion on July 21, 1989 and that she prepared the July 21 court order. She further testified that, because she was away on vacation at the end of July, respondent had sent the cover letter and order to opposing counsel as a favor to her (1T111-113). Ms. Fields was a New York attorney who worked independently in respondent's office. She was not admitted in New Jersey. Although pro hac vice papers had been

drawn up, they were never submitted to the court because respondent did not find a sponsoring attorney until September 1989 (2T19-20).[2]

Respondent testified as follows:

> There was testimony from Mr. Weinstein that I had several conversations with him. It is my testimony that I had one conversation with him. Ms. Fields was out of town in a bridge conference at that time and I did send a check in the mail that was due. Because without that check, Mr. Wolkoff would not have had visitation. I did send that in the mail to the law offices of the adversary, but I did not have any conversations with him whatsoever about any aspect of the case. . . . I did not write any papers in the case whatsoever outside of the original motion papers which were written by me prior to my suspension and were submitted prior to my suspension.
> [2T14-15]

After opposing counsel became aware of respondent's suspension on September 21, 1989, he filed a motion to have her removed from the case, which motion was granted in November 1989. In addition to granting the motion, the judge also awarded $2,000 in legal fees to opposing counsel.

The DEC found that respondent's testimony was not credible, in the face of the clear and detailed testimony of opposing counsel and his associate, and concluded that she practiced law while under the order of suspension, in violation of RPC 3.4(c). The DEC also found that respondent failed to disclose her suspension to the court, in violation of RPC 3.3(a). However, the DEC found that there was no clear and convincing evidence that respondent had misled her client into believing she had been reinstated to the

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[2] 2T refers to the transcript of the DEC hearing of May 1, 1991.

practice of law subsequent to November 1989. The DEC also found that, as in the Davilla matter, respondent's failure to adhere to Guideline No. 23 - - by not properly informing her client, the adversary and the court of her suspension - - was not a separate violation of the Rules of Professional Conduct beyond the rules already charged. The DEC concluded that it was not clear that the administrative guidelines are part of the "rules of a tribunal," as provided by RPC 3.4(c). Finally, the DEC found no mitigating circumstances that were causally related to respondent's conduct.

3. The Goldberg Matter (II-A-89-16E)

In June 1987, respondent was retained by Jeffrey Goldberg to handle the closing on the sale of his condominium. Respondent deposited in her trust account a $13,500 down payment from the buyers, which, by the terms of the contract for sale, was not to be released to the seller until July 27, 1987, the originally scheduled closing date. For reasons not relevant to these proceedings, the closing had to be postponed until August 21, 1987. Because of a dispute between the parties, however, the closing did not take place on that date. In fact, the closing never occurred. Thereafter, the purchasers filed a lawsuit for the return of the $13,500 deposit. By letter dated December 15, 1987, the purchasers' attorney asked respondent for information on the location of the escrow money and on the exact amount being held. Finally, on June 20, 1988, the purchasers' attorney received a letter from respondent, dated December 29, 1987, informing the attorney that

the funds were being held in account number 010-1011578 at the Edgewater National Savings Bank. Requests for bank statements concerning the deposit went unanswered. It was not until March 1989, after a judgment was entered in their favor, that the purchasers discovered that the account balance was only $8,325, with an unexplained deficit of $5,175.

It was respondent's position that she had been given verbal authorization from the purchasers' attorney to release $5,000 to her client, following the postponement of the original closing date. After respondent provided the ethics investigator with five check numbers allegedly related to the missing $5,175, the OAE obtained copies of those checks from the bank. These checks are as follows:

> Check 1229 dated August 3, 1987, made payable to Donna M. Lloyd, in the amount of $3,500.
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> Check 1231 dated August 3, 1987, made payable to Marcia S. Kasdan, in the amount of $75.
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> Check 1233 dated August 3, 1987, made payable to Wally Paseman, in the amount of $100.
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> Check 1238 dated August 23, 1987, made payable to Marcia Kasdan, in the amount of $1,000.
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> Check 1239 dated August 23, 1987, made payable to Wally Paseman, in the amount of $500.
> (Schedules C, D, E, F, G, and J-1 in evidence)

Respondent stipulated that these checks were drawn on the $13,500 amount being held in escrow in her trust account for the real estate transaction (J-1 in evidence).

At the DEC hearing, respondent's client, Mr. Goldberg, testified that he received $3,500 by a check from respondent made

out in his name and that he did not know anyone by the name of Donna M. Lloyd, the payee on one of the checks obtained by the OAE. Respondent then renounced the stipulation at the DEC hearing, maintaining that the check numbers she had given to the ethics investigator were related to another Goldberg closing that she had handled at that same time (2T145-147). Subsequent to the final hearing, respondent wrote to the DEC, readopting her initial version that these check numbers concerned the Goldberg closing at issue.

Throughout the DEC proceedings, respondent did not submit any records regarding the escrow funds or the specific checks or ledger sheets showing the disbursement of those funds. Respondent contended that the ledger sheets had been moved during construction on her house. When the DEC asked why she had not looked for the ledger sheets after the construction had ended, respondent offered no explanation (2T159-160, 2T163-164).

Mr. Goldberg testified that, in July 1987, his car was about to be repossessed and his condominium to be taken over by the bank. He testified further that, when he asked respondent to release part of the deposit to him, she replied that, although the purchasers had agreed to release the deposit, it could not be released fast enough and that she had arranged for a loan of $5,000 to him from another client (2T59, 2T66-67). He testified that he had received the $5,000 loan sometime during the first ten days of August 1987. However, respondent did not provide any documentation of this loan from another client and she neither denied nor acknowledged her

client's version of the facts. Respondent stipulated that these checks were drawn on the $13,500 amount being held in escrow in her trust account for the real estate transaction (J-1 in evidence).

The purchasers' attorney testified that his file notes included a notation that respondent had requested a release of one-half of the deposit funds:

> I find the following two notes on the 14th of July. It would appear from my notes I had a conversation with Ms. Kasdan in which she requested release of one half of the deposit being held. It would appear that on July 16, I discussed that situation and my notes do not spell in any greater detail what the situation was. I discussed that situation with Mr. Nathanson who turned down the request.
> [2T97]

In mitigation, respondent testified that her mother was suffering from cancer at that time (2T136) and that she had not answered the purchasers' attorney's request for information on the escrow funds because she knew she was in a compromising position for not having obtained a written authorization for the release of the escrow funds (2T137).

Just before the Board hearing, respondent retained counsel, who urged her to find the documents in this matter. At the Board hearing, new evidence was submitted explaining the checks drawn to the individuals that Mr. Goldberg had not recognized. These new documents indicated that respondent did initially lend Mr. Goldberg money from another client, Wallace Paseman. Later, when she had the escrow funds to pay back Mr. Paseman, he had directed that the

checks be drawn to his landlord, Donna M. Lloyd, and others (Certification of Wallace Paseman).

Mr. Goldberg testified that, after August 1987, he hired another attorney to handle the breach of contract action, filed subsequent to respondent's representation, and his entitlement to the escrow funds. Ultimately, because of the new attorney's alleged negligence, that attorney settled the suit by personally paying the $5,000 in disputed escrow funds to the purchasers.

The DEC found clear and convincing evidence that respondent failed to keep complete trust records; failed to notify the other party of the exact amount in escrow, despite numerous demands for that information; failed to safekeep funds subject to dispute, either by using the funds for her own purpose or by lending them to her client; failed to promptly deliver those funds to the other party once the court decided that party's entitlement thereto, and engaged in conduct involving dishonesty, fraud and deception, all in violation of RPC 1.15(a) through (d) and 8.4(c).

CONCLUSION AND RECOMMENDATION

After a de novo review of the record, the Board is satisfied that the conclusions of the DEC that respondent was guilty of unethical conduct are fully supported by the record. Respondent misrepresented her status as that of a fully licensed attorney to both her adversary and the court in two different matters, after she had been suspended by the Court for three months. She

deliberately decided she would continue to practice law, notwithstanding the Court's unequivocal denial of her application to stay her three-month suspension. She admitted that she intentionally did not disclose her suspension to the appropriate parties in either case, reasoning that it would hurt the client's case.

The last time respondent appeared before the Board, she gave assurances that she was then able "to counsel (her) clients a hundred percent on what is happening, whether it is good or bad" and not to make misrepresentations to them. In re Kasdan, 115 N.J. 472, 490 (1989). It is obvious that respondent still has not learned to tell the truth, as demonstrated by her acts toward opposing counsel and the court in the above matters.

In In re Goldstein, 97 N.J. 545 (1984), an attorney violated the agreement he had reached with the district ethics committee and the Board to limit his practice to criminal matters. Thereafter, the attorney was temporarily suspended from the practice of law. Notwithstanding his suspension, the attorney continued to advise clients that he was working on their cases. In addition to the foregoing violations, the Court also reviewed eleven individual matters and found a pattern of gross negligence, aggravated by the attorney's violation of the agreement with the committee and the Board and subsequent misrepresentation to clients that he was still working on their cases, notwithstanding his suspension. Under the totality of the circumstances, the Court felt constrained to disbar the attorney.

In a recent case, the Board recommended a two-year suspension for an attorney who intentionally altered an official document, grossly neglected a client's case, misrepresented the status of the case to his client, and failed to cooperate with the ethics system. In determining to disbar that attorney, who had previously been disciplined on two occasions, the Court cited as a significant factor his failure to comply with Guideline No. 23. The Court also noted that the attorney had shown no remorse or improvement in his conduct. In re Cohen, 120 N.J. 304 (1990).

Contrary to the DEC, the Board finds that each of respondent's failures to follow Guideline No. 23 constitutes a separate violation of RPC 3.4(c), in addition to violations of RPC 8.4(c) and RPC 3.3(a), as found by the DEC. Guideline No. 23 bears the stamp of approval of the Supreme Court and applies to every suspended or disbarred attorney. Moreover, the Court's Order of suspension specifically directs compliance with that guideline. Respondent's failure to comply with Guideline No. 23 violates the terms of the Court's order. Also, the Board cannot overlook respondent's cavalier attitude in this regard, as demonstrated by her admission that she never read Guideline No. 23 until she decided to petition for reinstatement, following the expiration of her three-month suspension. 2T36-39.

In the Goldberg matter, respondent was charged with releasing escrow funds either to her client or to herself without

authorization from the other party.[3] In In re Hollendonner, 102 N.J. 21 (1985), the Court stated that

> It is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties. . . . The parallel between escrow funds and client trust funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of In re Wilson, 81 N.J. 451 (1979). (citations omitted).
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> [In re Hollendonner, supra, 102 N.J. at 28]

The DEC found clear and convincing evidence that the purchasers' attorney never authorized the disbursement of the escrow funds. The Board, however, is unable to agree with the DEC's findings. In the Board's view, the record does not clearly and convincingly demonstrate that respondent knowingly disbursed those funds without authorization. The Board's conclusion is based upon its de novo review of the record, including the documents submitted at its hearing. The conflicting testimony and lack of evidence either to show or disprove authorization make it impossible to find a Hollendonner violation.

It is not clear that respondent did not receive verbal authorization from the purchasers' attorney to release the escrow funds. There is no letter from the attorney documenting a refusal

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[3] Respondent's counsel argued that the Board should not consider the charge of misuse of funds because it was raised for the first time in the DEC panel report. However, paragraph 12 of the complaint clearly states that the $5,175 payment from the escrow funds was not authorized by the purchasers and paragraph 18 charged a violation of RPC 8.4(c) for payment of funds subject to an escrow provision without permission. The complaint certainly placed respondent on notice that she was being charged with the unauthorized use of escrow funds.

to release escrow funds after the postponement of the closing at the end of July. In addition, respondent's client confirmed her version that she had authorization to release the funds.

Nonetheless, respondent's practicing law while suspended and failure to promptly advise opposing counsel of the whereabouts and amount of escrow funds compel the Board to recommend a three-year suspension. In reaching this recommendation, the Board considered respondent's prior discipline as an aggravating factor.[4] The Board searched the record for mitigating circumstances, but found none. Although, at the Board hearing, respondent provided certain documentation of the psychotherapy she received in 1989 and 1990, the Board found that the reports did not sufficiently demonstrate a causal link between her psychological condition and the ethics charges to constitute a mitigating factor.

The Board's majority recommends that the three-year suspension be prospective, given that respondent practiced law during her suspension. In addition, the Board majority recommends that, prior to reinstatement, respondent be required to submit competent psychiatric proof of her fitness to practice law. The Board

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[4] Respondent was found guilty of violations of the Rules of Professional Conduct, as follows: (1) failure to communicate with her clients; (2) misrepresenting the status of lawsuits to clients; (3) failure to collect sufficient funds at a closing of title; (4) issuance of a trust account check against uncollected funds; (5) fabrication of trial dates, and (6) preparation of a false pleading with the intent to deceive the client. On the Board's recommendation, the Court imposed a three-month suspension, followed by a two-year proctorship. However, when respondent petitioned for reinstatement, the current charges were pending before the DEC. The Court agreed with the Office of Attorney Ethics' ("OAE") position that reinstatement should await the Court's review of pending charges. Respondent continued to be licensed and to practice law in New York until February 2, 1992, when she was reciprocally suspended for six months in that state.

majority further recommends that, upon reinstatement, respondent be required to practice law under the supervision of a proctor. Two members voted for disbarment. Two members did not participate.

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

Dated: 6/22, 1992 By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board