

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-470

IN THE MATTER OF :
STEPHEN P. KERNAN, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 27, 1993

Decided: March 18, 1993

Mitchell H. Kizner appeared on behalf of the District I Ethics Committee.

John P. Morris 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 a recommendation for public discipline filed by the District I Ethics Committee (DEC).¹

Respondent was admitted to the practice of law in New Jersey in 1981 and maintained an office in Bridgeton, Cumberland County. On January 28, 1986, a civil action was filed in Superior Court, Law Division, against Harry Fisher. The suit alleged that Fisher entered onto his neighbors' property and cut down their trees. After initial representation by another attorney in the law office

¹ Respondent filed an answer to the complaint, essentially admitting the allegations and setting forth mitigating factors. Because of respondent's medical condition and treatment, the hearing before the DEC did not take place until nearly eighteen months after respondent's answer was filed. See discussion, infra.

of Basil D. Beck, in or about late October 1986, Fisher's file was given to respondent by an associate in that office.

On June 3, 1986, interrogatories were served upon Fisher through the Beck office. On October 10, 1986, plaintiff's counsel filed a motion requesting an order striking Fisher's answer and separate defenses, based upon Fisher's failure to answer the interrogatories.² The motion was granted. The order was issued on December 5, 1986 and was served upon the Beck office on or about December 8, 1986. On February 18, 1987, respondent filed a motion to vacate the court's order. The motion was denied because it had been filed more than thirty days after receipt of the order, contrary to R.4:23-5. Respondent then filed an appeal seeking reversal of the denial of his motion. The appeal was denied.

Subsequent to the denial of the appeal, plaintiff's counsel scheduled a proof hearing for April 15, 1988. Although respondent was notified of the hearing, he did not so inform his client. Moreover, respondent did not attend the hearing. According to his answer, respondent believed that, because the answer and separate defenses had been stricken, he was precluded from appearing and being heard at the proof hearing (Answer, paragraph 7). On April 27, 1988, judgment was granted against Fisher in the amount of \$23,747.12. Although respondent was notified of the judgment by

² In his answer, respondent indicated that he was given Fisher's file after the motion had been filed (Answer, paragraph 5). It appears from the record that at least brief answers to the interrogatories had been prepared. However, respondent failed to complete them until he met with Fisher for a third time, in January 1987. According to respondent's testimony, the answers were not typed until February 18, 1987 (T8/13/92 32, 83).

certified mail dated May 9, 1988, he did not advise his client of the result.³ Fisher did not learn of the judgment until August 15, 1988, when two members of the Cumberland County Sheriff's Department arrived at his home to serve him with a writ of execution. Respondent testified that he did not inform Fisher because he did not want to admit that he had made a mistake (T8/13/92 57).⁴

The DEC determined that respondent had violated RPC 1.1(a), RPC 1.3 and RPC 1.4. The DEC was of the opinion that respondent's misconduct warranted the imposition of a private reprimand, but felt constrained to recommend public discipline in light of respondent's previous discipline (See, discussion, infra). The DEC urged the Board to consider the mitigating factors present in this matter in determining the form of such discipline.

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 is fully supported by clear and convincing evidence.

³ Respondent stated in his answer that he also failed to tell Beck of the judgment because he was embarrassed at the amount of the judgment and did not know how to proceed after it was entered. Beck learned of the judgment in August 1988 through a telephone call from Fisher or his girlfriend (T8/13/92 57).

⁴ It appears that, for some time, respondent had kept Fisher informed of the status of the case. According to respondent's testimony, he told Fisher that it was respondent's fault that the answers to the interrogatories were late, that the motion to reinstate was being filed and that an appeal would be filed, if necessary (T8/13/92 38).

Setting aside for the moment respondent's disciplinary history and mitigating factors, respondent's violations of RPC 1.1(a), RPC 1.3 and RPC 1.4 might independently merit a public reprimand. Cases dealing with gross neglect, lack of diligence and failure to communicate in one matter are fact-sensitive and ordinarily result in the imposition of a private or public reprimand. In those cases leading to a private or public reprimand, however, the failure to communicate consists of failing to keep the client informed of the status of the matter. In this case, respondent's failure to communicate was far more serious because it went beyond failure to comply with a client's requests for information about the progress of the case. Respondent did not inform Fisher that a judgment in the amount of over \$23,000 had been entered against him. His conduct warrants at least a public reprimand, again, if his prior ethics history is not considered. See, e.g. In re Rosenblatt, 118 N.J. 559 (1990) (public reprimand for lack of diligence in a personal injury matter and failure to return the client's file within a reasonable time after the representation was terminated; this was Rosenblatt's third public reprimand); In re Cervantes, 118 N.J. 557 (1990) (public reprimand for lack of diligence in two matters, failure to communicate in two matters and misrepresentation in one matter); In re Stewart, 118 N.J. 423 (1990) (public reprimand for gross neglect in an estate matter and failure to keep the client informed about its status - Stewart had received a private reprimand ten years earlier), and In re Williams, 115 N.J. 667 (1989) (public reprimand for gross neglect

in one matter, failure to cooperate in one matter, lack of cooperation with DEC investigator and failure to file an answer).

As noted above, the DEC was of the opinion that respondent's previous disciplinary history warranted upgrading the discipline that might otherwise be appropriate in this matter, i.e., a private reprimand. The Board has examined the time period in question to determine whether respondent's previous discipline should be considered as an aggravating factor.

The misconduct in the case at bar spanned from October 1986 through August 1988. Respondent's first run-in with the disciplinary system led to the imposition of a private reprimand, on December 2, 1986, for engaging in a conflict of interest by representing buyer and seller in a real estate transaction. Therefore, respondent was aware of his improper behavior at the time of the events currently under consideration, albeit that behavior had taken place in an unrelated area of practice. In March 1990, respondent was suspended for three months, for misconduct that occurred in 1987.⁵ Subsequently, on June 27, 1991, respondent was transferred to disability inactive status.⁶ Most recently, he was publicly reprimanded, on September 16, 1991, for behavior that occurred in 1989.⁷ Accordingly, respondent had been

⁵ Specifically, on March 30, 1990, respondent was suspended for three months for violating RPC 3.3 and RPC 8.4. Respondent transferred real estate to his mother the day before a Superior Court hearing to determine the amount of a support judgment sought to be entered against him by his ex-wife.

⁶ Respondent remains on disability inactive status.

⁷ Respondent was disciplined for gross neglect in a civil action and in a municipal court matter, both arising from an automobile accident.

disciplined only once at the time that the within misconduct took place. Nevertheless, the behavior that led to the 1990 three-month suspension was already under investigation; respondent was, at least, on notice that his conduct was questionable.

The purpose of discipline, however, is not the punishment of the offender but "protection of the public against an 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, 176 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline imposed must comport with the seriousness of the ethics infractions in light of all the relevant circumstances.

In his answer and in his testimony before the DEC, respondent advanced the claim of psychological difficulties, in mitigation of his misconduct.⁸ Respondent testified that his marriage had ended, that he had lost his job⁹ and that he had experienced difficulty in finding new employment. He also testified about his problems with alcoholism and the treatment he sought for that condition.

The DEC found that the evidence presented conclusively established that, since approximately 1986 and through and including the time period relevant to the within complaint, respondent was suffering from bipolar affective disorder, "substance use disorder" and alcohol dependence. In its report,

⁸ In his answer, respondent also set forth the steps he has taken to insure that he is not placed in a similar situation in the future.

⁹ Respondent's ex-wife is the daughter of a partner in the law firm where he had been employed.

the DEC noted that "the unethical conduct involved in this matter is unquestionably related, and is the result of, the Respondent's medical disabilities as aforesaid," and that respondent has undertaken "responsible and sincere efforts to deal with his medical disabilities" (Hearing Panel Report, paragraph 7).

Exhibit R-4 is a letter dated August 12, 1992 from Dr. Thomas Robbins, M.D., in which he states that he has been seeing respondent since January 30, 1992, that respondent was taking no medication and that he had remained sober. Dr. Robbins went on to opine that respondent is ready to return to the practice of law.

Although not an excuse for misconduct, such difficulties as respondent's may be considered in mitigation, if proven to be causally connected to the attorney's unethical actions. In In re Templeton, 99 N.J. 365 (1985), the Court held:

In all disciplinary cases, we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently for some credible reason other than professional and personal immorality that could serve to explain and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment.

[Id. at 373-4]

The Board found that respondent's psychological difficulties and his ethics infractions were causally linked and took those difficulties into account, in mitigation of his misconduct.

The Board also considered respondent's candor and cooperation with the DEC.¹⁰

As noted above, at the time of the within violations, although respondent was already aware of the filing of the grievance and of the investigation that led to his three-month suspension, his ethics record included only a private reprimand. Accordingly, the Board is of the view that a public reprimand is adequate discipline for respondent's within infractions. The Board unanimously so recommends. The Board also recommends that respondent practice under a proctorship for a period of two years.¹¹ Further, the Board recommends that respondent be required to submit quarterly psychiatric reports for two years, proving his continuing sobriety and fitness to practice law. Three members did not participate.

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

Dated: _____

3/18/93

By: _____

Elizabeth L. Buff

Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board

¹⁰ The Board has noted that Fisher was made whole through a subsequent malpractice action. The malpractice action was resolved for \$87,500. The plaintiff in the civil action received approximately \$23,500 for compensatory and punitive damages. The balance was paid to Fisher for emotional distress (T8/13/92 61).

¹¹ Respondent testified that he is already required to have a proctor and, in fact, knew an individual who had agreed to serve in that capacity (T8/13/92 87).