SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-085

IN THE MATTER OF

RICHARD M. PISACANE

AN ATTORNEY AT LAW

Decision

Argued: June 19, 1996

Decided: November 20, 1996

Brian J. Gillet appeared on behalf of the Office of Attorney Ethics.

Respondent failed to appear, despite proper notice of the hearing.[1]

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 Special Master Edward F. Seavers, Jr. Three formal complaints, consolidated for hearing, collectively charged respondent with violations of RPC 1.15 (knowing misappropriation); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 4.1(a) (making a false statement to a third person); RPC 3.4 (fairness to others); RPC 1.3 (failure to act

[1]Respondent was personally served with notice of the Board proceedings by Comet Delivery Service.

diligently); RPC 1.4 (failure to communicate) and RPC 8.1 (knowingly making a false statement of material fact to disciplinary authorities and failure to cooperate with disciplinary authorities).

Respondent was admitted to the New Jersey bar in 1969. He was temporarily suspended by Order of the Supreme Court dated July 12, 1995, amid allegations of misappropriation of trust funds. He has also been indicted for theft, forgery, falsification of records and uttering a false instrument, in connection with one of the present matters (DiMarco).

* * *

Between August and October 1995, the Office of Attorney Ethics (hereinafter "OAE") filed three separate complaints charging respondent with knowing misappropriation of client funds, among other violations. An OAE investigator personally served respondent with a copy of two of the complaints (DiMarco and Piard) by visiting his residence on August 15, 1995 and hand-delivering the complaints to respondent. These complaints had been previously sent to respondent at his residence by regular mail. Because respondent filed no answer to the DiMarco and Piard complaints, the OAE amended its complaints, by letter dated September 8, 1995, to allege a violation of RPC 8.1(b). That letter further advised respondent that continued failure to answer on his part would constitute an admission of the charges, that no further hearing needed to be held and that the entire record in these matters "[would] be certified directly to the Disciplinary Review Board for imposition of sanction, pursuant to R. 1:20-6(c)(1) and R. 1:20-4(f)" (default). The certified mail copy of that letter was returned as unclaimed. The regular mail copies were never returned.

On or about October 10, 1995, the OAE mailed to respondent's residence a copy of the formal complaint in a third matter (Wilson). The regular mail was not returned and the green card was returned, with an illegible signature, on October 24, 1995. In addition, an OAE investigator traveled to respondent's residence on October 13, 1995 to serve respondent with a copy of the Wilson complaint. Because no one responded to the investigator's repeated knocks at the door, the investigator left the complaint along with his business card.

Respondent did not file an answer to any of the three complaints. Moreover, respondent did not appear or participate in either the pretrial conferences or the hearings in these matters. Inasmuch as respondent had been properly served with the various complaints, the special master elected to certify the record directly to the Board for imposition of sanction, pursuant to R.1:20-4 (f)(1). The special master found respondent guilty of knowing misappropriation in all three matters, along with various other violations, including dishonesty, fraud, deceit or misrepresentation, all of which were supported by the record. The special master recommended that respondent be disbarred pursuant to In re Wilson, 81 N.J. 451 (1979) and its progeny.

In spite of his decision to proceed on a default basis, and at the OAE's urging, the special master conducted a "proof hearing" over the course of two days, during which the OAE offered certain testimony and exhibits for consideration. The OAE had taken the position that, because the default procedure was new, having been first effective on March 1, 1995, and the alleged misconduct so serious, it would be more prudent to proceed by way of a formal hearing, during which the OAE would be required to prove its case. While the special master appeared to disagree with the OAE's position, he nonetheless conducted a hearing.

* * *

Respondent was charged with misconduct in three separate matters: DiMarco, Piard and Wilson.

The DiMarco Matter

In or about mid-1992, respondent approached his clients, Michael and John DiMarco, two brothers who were involved in the trash disposal business, with a business proposition involving the purchase and/or lease of approximately one thousand acres of land in upstate New York from the St. Regis Mohawk Indian Nation. Respondent's proposed plan was to construct and operate a sanitary landfill following the acquisition of the land. Respondent, who was a principal in the negotiations and structure of the project, was to act as attorney in this transaction and to hold a fifty-percent equity interest in Chrisdan Environmental Technologies, Inc. ("CET"), the corporation specifically formed for the transaction. The DiMarcos and some other individuals were also to hold an equity interest in CET.

In or about the fall of 1992, respondent requested that the DiMarcos give him $505,000 to demonstrate to the Mohawk Indian Council ("Council") that CET had the financial ability to consummate the proposed transaction. The DiMarcos wired $505,000 from their account on December 3, 1992, which was credited to respondent's trust account on December 7, 1992. It was Michael DiMarco's understanding that respondent would maintain this money in his trust account. DiMarco testified, in short, that the purpose of the money was merely to show the Council that CET had the financial wherewithal to complete the transaction. While Michael

DiMarco's understanding of that particular purpose of the money appears to be somewhat inconsistent with some of the documentation in the record, it is clear that neither of the DiMarcos expected or authorized respondent to disburse their money for any purpose. Moreover, respondent wrote several letters to the Council, to the DiMarcos and later to their attorney, acknowledging that he had received and continued to hold the DiMarcos' funds in trust.

Within days of the transfer of funds to respondent's trust account, Michael DiMarco become concerned with the transaction and the lack of overall documentation. He, therefore, contacted Robert Moroff, an attorney who was a mutual friend or acquaintance of both respondent and the DiMarcos, apparently to express his concern and to solicit his opinion and assistance in the matter. In response to the DiMarcos' strong concerns, on December 10, 1992, Moroff wrote respondent a letter urging him to either provide the DiMarcos with written documentation proving that the funds remained in trust or to immediately return the full sum to the DiMarcos. The following day, on December 11, 1992, respondent wrote to the DiMarcos and indicated that he had arranged earlier for his bank to transfer $400,000 of the money into its trust department for the purchase of treasury bills. Respondent promised documentation from the bank within a few days. Respondent also enclosed a copy of a letter he had written to the Council. Respondent closed his letter to the DiMarcos by urging them not to discuss the deal with anyone until CET was able to enter into a binding lease with the Council. Respondent made no mention of the $105,000 balance.

Thereafter, on March 16, 1993, respondent again wrote to the DiMarcos, notifying them of his progress in his negotiations with the Council and setting forth the need for additional

funds. In that letter, respondent further represented that, on February 25, 1993, he had forwarded the $505,000 to the Council's attorney to hold in escrow pending completion of the transaction. Therefore, he assured them, "the $505,000 is still in Trust and is protected." Respondent did not supply the DiMarcos with any supporting documentation evidencing the whereabouts of their money. Once again, respondent closed his letter by reminding the DiMarcos not to discuss the pending transaction with anyone for fear that "there may be many new players attempting to interfere" with the consummation of the transaction.

At respondent's specific solicitation, the DiMarcos gave respondent additional funds by way of two checks totalling $150,000. These payments were credited to respondent's trust account on April 26, 1993. The DiMarcos made yet two additional payments to respondent in the total amount of $150,000 on June 15, 1993. Those payments were credited to respondent's trust account on that same date. Therefore, by June 15, 1993, respondent had received a total of $805,000 from the DiMarcos. Again, according to Michael DiMarco, these funds were never to be disbursed, but to be used as "show money" and to be held in trust by respondent. It is not clear why the DiMarcos gave respondent an additional $300,000, knowing that respondent had, presumably, released the $505,000 to the Council's attorney. The special master commented that, although Michael DiMarco was sincere, he appeared somewhat unsophisticated.

Despite respondent's repeated reassurances to the DiMarcos, he did not maintain their funds intact at all times. In fact, beginning on the very first day of the initial credit of the $505,000 to respondent's trust account, he began making disbursements to himself against the funds in the form of loans, fees and "contribution" payments.

All in all, from the $805,000 the DiMarcos entrusted to respondent he used $670,000 for his benefit. He also used $120,000 for the benefit of clients unrelated to the landfill transaction and for himself as well.

The DiMarcos learned of respondent's use of their funds only after they contacted yet another attorney, Mark Larner, to inquire into the status of both the negotiations and their funds. Michael DiMarco became concerned after he received a letter from a Council representative on or about February 10, 1994, advising him that the transaction was null and void due to DiMarco's alleged (and unspecified) inaction on the project. Michael DiMarco contacted respondent upon receipt of the letter to learn the specific status of the transaction. Unbeknownst to DiMarco, respondent had urged the Council to generate such a letter in order to encourage DiMarco to provide yet additional funds to complete the project. Respondent assured DiMarco that everything was fine and that the Council was just "flexing its muscle" to gain advantage in ongoing negotiations.

Larner contacted respondent on several occasions, both by telephone and by letter, to insist that respondent produce specific documentation proving that the $805,000 remained intact and in trust. After much back and forth, by letter dated May 10, 1994, respondent forwarded to Larner a copy of a May 6, 1994 letter from Howard Cerney, another Council attorney, acknowledging receipt of $800,000, which he, Cerney, was holding in trust pending the execution of the written agreements between the parties. (No reason was offered for the $5,000 discrepancy.) The letter gave very specific, albeit false, information about the whereabouts of the funds, including the name of the financial institution and the number of the account in which the funds were purportedly held.

Upon receipt of the Cerney letter, Larner attempted to contact Cerney directly by telephoning the number listed on the letterhead. He learned that that number had been disconnected. After some investigation, Larner learned that Cerney had died on September 19, 1993, eight months before the date of the letter. Respondent later admitted to the committee investigator that he had prepared and forged the letter on letterhead he had ordered from a local printer in order to forestall further action by Larner in the DiMarcos' behalf.

Ultimately, Larner filed suit against respondent in the DiMarcos' behalf in order to recover their monies. On or about August 2, 1994, respondent entered into a consent judgment, agreeing to pay the DiMarcos the full amount of their deposit plus interest and attorney's fees, totalling $911,464.52. To date, respondent has paid nothing on that judgment.

The Piard Matter

In or about June 1994, Agnes Piard, a Florida resident, retained respondent to represent her in an estate matter. Ms. Piard was an heir to the estate of her uncle, Nicholas Pucciarelli. When Ms. Piard's daughter, who was respondent's hairdresser, shared her mother's legal experiences with respondent, he volunteered to expedite Ms. Piard's receipt of the estate funds to which she was entitled.

On or about July 29, 1994, respondent received from the estate executor a $10,000 check payable to both himself and Ms. Piard. That check represented only a partial distribution of Ms. Piard's inheritance. Respondent forwarded the check to Ms. Piard by letter dated August 5, 1994 and instructed her to endorse the check and to return it to him for "distribution." Respondent proposed to return $7,500 to Ms. Piard and to retain $2,500 towards his fee (there

was no written fee agreement). Consistent with respondent's direction, Ms. Piard endorsed the check and returned it to him. Respondent deposited the check into his office payroll account on August 10, 1994. He did not forward to Ms. Piard any portion of the $7,500. The payroll account balance fell to $1,584.48 ten days after respondent deposited Ms. Piard's funds into that account.

Respondent received a second partial distribution of $5,000 from the executor on or about September 20, 1994 and forwarded that check to Ms. Piard that same date. He had endorsed the check and instructed her to retain the entire amount after her endorsement.

Respondent received a final distribution of $31,809.36 on or about November 21, 1994. Although an endorsement of Ms. Piard's signature appeared on the back of that check, the signature appears to the untrained eye to be different from her endorsement on the other checks. However, since Ms. Piard did not testify before the special master, the issue of potential forgery was not addressed.

On November 29, 1994, respondent deposited the check for $31,809.36 (plus $500 cash) into a personal account he and his wife had opened earlier that month. Almost immediately, respondent began to disburse those funds for various personal expenses, including a personal loan repayment and college tuition for one of his sons. Within two months of his deposit of Ms. Piard's final distribution check into his personal account, that account balance fell to $10.64.

In the meantime, Ms. Piard, who had already signed a release of final distributive share, learned from various relatives that they had received their final distributions long ago. She, therefore, telephoned respondent on several occasions, at which times he offered her several excuses. Specifically, respondent told Ms. Piard that he had encountered some problems with

the accounting provided by the estate executor; on another occasion, he told her that he had not yet received the check for her final distribution, a statement that seems to confirm that respondent had, indeed forged her signature on the final distribution check before depositing it into his personal account. Finally, on January 3, 1995, respondent sent Ms. Piard what appears to be a personal check in the amount of $26,000 "to replace the previous check we sent to you, which has obviously gotten lost in the mail." After Ms. Piard deposited the check into her account, it was returned for insufficient funds.

Thereafter, Ms. Piard again telephoned respondent, who forwarded her yet another check in the amount of $26,000 and one in the amount of $10,000. The check for $26,000 was again returned for insufficient funds. Ms. Piard did not attempt to deposit the $10,000 check, as she had apparently grown weary of bank processing charges. During her next conversation with him, Ms. Piard told respondent that she intended to contact both the prosecutor's office and the district ethics committee if he did not immediately send her the funds, either by certified check or wire transfer. Respondent then wired $23,000 to Ms. Piard's account on January 31, 1995 and paid her an additional $18,800 by check dated June 28, 1995. The latter payment was made after respondent was notified of an OAE demand audit and before the audit. Essentially, respondent repaid Ms. Piard her entire distribution without any deduction for legal fees, in an attempt to have her withdraw the ethics grievance she had filed against him. 1T172.[2]

The OAE auditor testified that, at the first demand audit of respondent's records in December 1994, respondent denied that he was holding any client funds (aside from the DiMarco funds). By that point, respondent had received and deposited Ms. Piard's final

[2]IT refers to the transcript of hearing before the special master on November 20, 1995.

distribution check into his personal account. At the second demand audit in June 1995, respondent admitted to the OAE auditor that he had indeed received the Piard funds by that date. He added, however, that because he had not deposited those funds into his trust account, he had answered negatively the question of whether he was holding any other trust funds. 1T157-159. Finally, the auditor testified that respondent had failed to produce any of the documentation about the Piard matter specifically requested by the OAE.

The Wilson Matter

Respondent was named executor and trustee in the Last Will and Testament of Ruth Wilson, who had died at some point before March 15, 1991. Respondent had prepared Ruth Wilson's will. On or about March 15, 1991, after the probate of the will, respondent opened a bank account in the name of "Estate of Ruth Wilson, Richard M. Pisacane, Trustee." The value of the estate was probably in excess of $700,000.[3] According to the formal complaint and records of deposit, between March 15, 1991 and April 15, 1993, respondent deposited approximately $766,311.13 into the estate account. The decedent's son and daughter were the two principal beneficiaries under the will. They never received any portion of their inheritance. Rather, between March 27, 1991 and May 6, 1994, respondent wrote and negotiated approximately 150 checks against the estate account, the major portion of which (115 checks) were payable either to respondent himself, to his firm or to others for personal expenses. Those

[3]Respondent's final accounting (Exhibit C-62) shows that the total value was between approximately $660,000 and $701,000. The OAE's analysis of the estate showed a total of $773,063.94 in deposits to the estate account. Exhibit C-63.

disbursements totalled approximately $675,000. Exhibit C-65. Respondent had claimed between $75,000 and $95,000 in legal and fiduciary fees. Exhibits C-62 and C-36A.

Although the background is somewhat unclear, at some unidentified point the decedent's daughter, Susan Wilson, contacted respondent and threatened to file an ethics grievance against him. Indeed, she and/or her brother filed a grievance. On or about July 13, 1995, respondent telefaxed a handwritten letter to Susan Wilson, offering total reimbursement of the estate funds without deduction for a fee, plus ten percent interest, in return for "[discontinuing] all litigation." Exhibit C-66. The Wilsons pursued the matter and, to date, have received none of the funds due them.

* * *

As previously noted, following the default procedure, the special master found respondent guilty of all charges, for which the special master recommended disbarment. Following the separate "proof hearing," the special master found respondent guilty of substantially all of the violations charged. Specifically, in the DiMarco matter, the special master concluded that respondent had knowingly misappropriated the $805,000 he had received from his clients. In addition, because of respondent's several misrepresentations to the DiMarcos and others that he continued to hold the funds in trust, the special master found respondent guilty of violations of RPC 8.4(c), RPC 4.1 and RPC 3.4. Finally, the special master found that respondent had failed to pursue the landfill transaction and to keep his clients informed truthfully about the matter, in violation of RPC 1.3 and RPC 1.4.

In the Piard matter, the special master found that respondent had knowingly misappropriated at least $36,000, in violation of both RPC 1.15 and RPC 8.4(c). The special master gave respondent credit for the balance of $5,000 as a claimed legal fee. However, because Ms. Piard did not testify and because there was no documentary evidence to support a finding of misrepresentation about the status of the estate funds, the special master concluded that the OAE had not proved violations of RPC 4.1(a) and RPC 8.4(c). Finally, the special master concluded that respondent had violated RPC 8.1(b) for his failure to produce the Piard records at the demand audit. He declined to find that respondent had lied to the OAE investigator during the demand audit when he denied that he was holding any other client funds. The special master noted that, by that point, respondent had already misappropriated the funds.

In the Wilson matter, the special master found that respondent had stolen estate funds, in violation of RPC 8.4(c). He concluded that RPC 1.15(a) was inapplicable because respondent held the estate funds not as an attorney, but as a fiduciary. The special master acknowledged, however, that the court had treated such thefts as the functional equivalent of a knowing misappropriation, citing In re Spina, 121 N.J. 378 (1990) and In re Kelly, 120 N.J. 679 (1990). Lastly, the special master found that respondent had violated RPC 8.1(b) for his failure to produce the Wilson records at the demand audit or at any time thereafter.

The special master denied the OAE's request to amend its complaint during the hearing to allege violations of RPC 8.1(b) for respondent's failure to file an answer or to appear at the hearing. The special master did so for two reasons. First, he found that, although the OAE had written to the respondent on September 9, 1995 advising him of its intent to so amend the complaint in the DiMarco and Piard matters, the OAE had "not raised this aspect at both pretrial

conferences to insure that the issue was listed in the pretrial orders and would be addressed at the hearing." Special master's report at 13. Moreover, he noted, if the OAE's letter of November 13, 1995 in the Wilson matter had served as an amendment to the complaint, then respondent's time to answer would not have expired. Second, the special master noted that "no case cited by the OAE states that failure to answer or failure to appear at a hearing constitutes a separate violation for which discipline can be imposed rather than being an aggravating factor." Id. at 14. In short, the special master found that it was only by virtue of the new rules that specific consequences flowed from an attorney's failure to answer (R.1:20-3(g)(4), temporary suspension) or to appear at a disciplinary hearing (R.1:20-4(f)(1), default).

The special master recommended that respondent be disbarred.

* * *

Following a de novo review of the record, the Board is satisfied that a majority of the special master's findings of unethical conduct are clearly and convincingly supported by the record. Certainly, the record certified by the special master directly to the Board for imposition of sanction, pursuant to R.1:20-4(f)(1), supports findings of knowing misappropriation and dishonesty, as well as the remainder of the violations collectively charged in the complaints. Proper service of the complaint was clearly made here: there is no reason why the special master and the Board could not have processed the matter only as a default, pursuant to R.1:20-4(f)(1). The hearing before the special master did not provide any additional insight into any of the three individual complaints. The competent proofs offered by the OAE clearly and

convincingly support a finding that respondent engaged in knowing misappropriation of client funds in all three matters, including Wilson. As in DiMarco and Piard, the Wilson funds were client funds. Respondent acted not only as a fiduciary in that matter, but also as the estate attorney; in his final accounting, respondent showed a disbursement to himself for both executor's fees and attorney's fees.

The Board noted that, contrary to the analysis of the special master, respondent's failure to cooperate in the ethics proceedings before the district ethics committee did constitute a separate violation of the RPCs and would, ordinarily, merit discipline on its own. An attorney's hesitancy in responding to an ethics grievance might only be considered in aggravation of penalty to be imposed where other misconduct is present. However, where that "hesitancy" continues throughout the process and includes failure to answer an ethics complaint or to attend the hearing at the district ethics committee level, a separate ethics violation, independently worthy of discipline, has been found. See, e.g., In re Macias, 121 N.J. 243 (1990), (reprimand for failure to comply with random audit).

In addition, while failure to raise the issue of violation of RPC 8.1(b) at a pre-trial conference might reasonably bar the amendment of a complaint at a later date, due to fairness issues, the same rationale cannot be applied in a case where respondent has not had the courtesy to either answer the complaint or appear at a pre-trial conference.

In this matter, respondent has knowingly misappropriated approximately $1,500,000 in client funds. Under the circumstances, disbarment is the only appropriate resolution. In re Wilson, supra, 81 N.J. 451 (1979). The Board, therefore, unanimously recommends that respondent be disbarred. Two members did not participate.

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

Dated: 11/20/96

LEE M. HYMERLING
Chair
Disciplinary Review Board