SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-320

IN THE MATTER OF

PETER B. HILGENDORFF,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 16, 1991

Decided: March 1, 1991

Robert C. Shelton, Jr. appeared on behalf of the District X Ethics Committee.

James F. Sullivan appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District X Ethics Committee.

Respondent was admitted to the New Jersey bar in 1970, and practices with a law firm in Morristown.

In April 1984, grievant, Clemens Jordone, suffered an injury to her foot when sink in her apartment fell from the wall. Within a few days of the accident she went to a law firm in Newark. After the law firm held the file for nearly two years, it unilaterally referred the file to respondent within two weeks of the running of the statute of limitations (1T-66).[1] Without meeting with

[1] 1T refers to the transcript of the hearing on September 16, 1988 before the District X Ethics Committee.

grievant, respondent filed a complaint in district court in Essex County. He testified that four or five times during 1986, he wrote or telephoned grievant and advised her to be available for court by remaining at home, close to the telephone. He never discussed the facts of the case or the status of the legal proceedings with grievant.

On September 10, 1986, Larry McNeil, the only named defendant, filed a motion pro se to vacate a default judgment that had been entered against him in the case. He filed an affidavit stating that he was not the owner of the property in which grievant had been injured. After respondent checked the appropriate files at the Essex County Hall of Records and confirmed that McNeil was not in fact the owner, respondent did not oppose the motion and the case was dismissed.

Grievant asserts that, thereafter, respondent told her there was no money in the case, without explaining why, and that he was going to give her $500 of his own money (1T20). Respondent's testimony was substantially different. He testified that he told grievant he named the wrong defendant in the complaint, and that it was his error. In addition, he negotiated to have the doctor's bill forgiven (1T64).

In January 1987, he sent grievant a standard release form running from grievant to McNeil together with his trust account check for $500. Grievant did not sign the release, but did cash the check. When respondent was asked why the release ran to McNeil, instead of himself, respondent answered: "He was the

defendant named in the lawsuit and there wasn't anybody else to release, I wasn't releasing myself" (1T67).

The second day of the ethics hearing addressed the source of the $500 trust check. Respondent testified that the $500 came from a fee earned in another matter (R-7 in evidence). He used these funds to write the trust check directly to grievant without first transferring this fee to his business account and then writing a business account check to grievant.

The formal complaint charged respondent with violating RPC 1.4(b), in that he failed to keep grievant informed of the status of her case, and RPC 1.2(a), in that he failed to abide by his client's decision as to settlement.

The committee found that respondent had failed to seek his client's input as to the factual basis of her case, and had failed to advise her of the procedural status of her case, in violation of RPC 1.4(a) and (b). The committee also found that respondent had violated RPC 1.1(a), in that he displayed gross negligence by failing to investigate the facts of the case, failing to include one or more "John Does" as fictitious defendants, and failing to amend the complaint to interpose the defense of estoppel so McNeil could not deny his status as owner or liability as the agent of the owner. Furthermore, the committee concluded that respondent had violated RPC 1.15(d), by not complying with the provisions of the recordkeeping rule, R. 1:21-6, with respect to his handling of the

fee earned in the other matter.[2] The committee recommended public discipline.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the ethics committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. The Board does not concur, however, with the specific finding that respondent was grossly negligent, in violation of RPC 1.1(a).

The Board finds that respondent's failure to research the facts in order to name the proper defendant and to name a "John Doe" in his complaint constituted negligence and may be a basis for a malpractice suit. It did not, however, rise to the level of gross negligence so as to become unethical under RPC 1.1(a).

The Board does find that respondent failed to keep grievant reasonably informed about the status of the matter and to explain the matter to her to the extent reasonably necessary to permit her to make an informed decision about the matter, in violation of RPC 1.4(a) and (b). An attorney's failure to communicate with his client diminishes the confidence the public should have in members of the bar. Matter of Stein, 97 N.J. 550, 563 (1984). Furthermore, respondent violated RPC 1.15(d) by not complying with the

[2] The committee did not comment on the RPC 1.2(a) violation alleged in the complaint. However, the testimony demonstrates that there was no "settlement" in this case, which makes the RPC 1.2(a) charge in the complaint inaccurate and appropriately ignored by the committee.

requirements of R. 1:21-6 with respect to his handling of the $500 trust payment to grievant. Respondent should have transferred the earned fee to his business account prior to disbursing the $500 to grievant.

Proper trust account and recordkeeping procedures are fundamental to the practice of law. Every attorney has a duty to maintain books and records, as required by R. 1:21-6. Although, in the past, attorneys have been privately reprimanded for technical recordkeeping improprieties similar to respondent's, the Board notes that respondent's misconduct in this case include violations of RPC 1.4(a) and (b) and that his previous private reprimand[3] must be considered in determining the quantum of discipline.

The purpose of discipline is not the punishment of the offender, but "protection of the public against the attorney who cannot or will not measure up to the high standards of responsibility required of every members of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethical infraction in light of all relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors are, therefore, relevant and may be considered. In re Hughes, 90 N.J. 32, 36 (1982). In mitigation, the Board has considered that respondent candidly admitted his

[3] A private reprimand, dated July 25, 1988, was issued after respondent failed to provide answers to interrogatories. When the defendants filed a motion to dismiss the complaint, he failed to object or to take steps to rectify the dismissal. This failure was found to be gross negligence, in violation of DR 6-101(A)(1).

misconduct in this matter. However, the Board has considered, as an aggravating factor, respondent's private reprimand in 1988 for substantially similar behavior.

Accordingly, the Board majority recommends that respondent be publicly reprimanded. In addition, the Board recommends that an audit of respondent's trust and business account records be conducted by the Office of Attorney Ethics. One member voted for a private reprimand, reasoning that failure to communicate and minor recordkeeping violations do not warrant public discipline, particularly in view of the fact that respondent did not receive the case until almost two years after the accident had occurred.

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

Dated: 3/1/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board