SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-133

IN THE MATTER OF	:
ALAN H. MARLOWE,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 17, 1991

Decided: October 3, 1991

Michael J. Powers appeared on behalf of the District IIB Ethics Committee.

Respondent did not appear for oral argument.[1]

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 IIB Ethics Committee (DEC). The formal complaint charged respondent with improperly soliciting fees from an indigent defendant. Thereafter, respondent was charged with failing to

[1] Respondent did not appear nor did he properly waive his appearance before the Board, despite having received proper notice of the hearing.

cooperate with the DEC investigation.

Respondent was admitted to the New Jersey bar in 1971. At the time of his alleged unethical conduct, he maintained an office in Fairfield, New Jersey.

In or about April 1988, respondent was working as a pool attorney for the Office of the Public Defender, Bergen Region (hereinafter "the public defender"). On April 11, 1988, the public defender assigned the matter of State v. Buitron to respondent. Respondent claimed that, soon thereafter, he and Buitron reached an agreement whereby Buitron would pay respondent for his services. It was understood that Buitron's brother, Felix Mendoza, would be responsible for making the payments to respondent. The propriety of this agreement, which was never memorialized, was neither sanctioned nor questioned by the public defender. Mendoza ultimately paid respondent $2,000 for services rendered. At some point, Mendoza became dissatisfied with respondent's representation and retained another lawyer to complete his brother's matter.

At the DEC hearing, respondent and Mendoza each testified regarding the fee arrangement in Buitron. Because the testimony on this score was in equipoise, the DEC was unable to conclude, by clear and convincing evidence, that respondent had violated RPC 8.4 by improperly entering into a fee agreement with an indigent defendant or with his brother. Because the DEC did not make any credibility findings with regard to the testimony of either respondent or grievant, the Board is constrained to agree with the DEC's findings.

As the result of respondent's conduct in the Buitron matter, a formal complaint was filed against him on September 22, 1989.[2] Pursuant to R. 1:20-3(i), respondent was required to file a formal answer to the complaint within ten days of his receipt of same. Respondent was notified of the ten-day requirement in the cover letter accompanying the complaint. Respondent, nevertheless, failed to comply with R. 1:20-3(i).

By letter dated October 10, 1989, respondent was charged with a violation of RPC 8.1(b) for failing to answer the complaint. 1T2. On July 11, 1990, a second letter amendment to the complaint was sent to respondent, instructing him to file a detailed, responsive answer to the complaint, as he had been instructed earlier. Additionally, the letter informed respondent that his failure to do so would result in an amendment to the formal complaint, by the July 11, 1990 letter, charging him with a willful violation of RPC 8.1(b). The letter also advised that a hearing had been scheduled in the matter for August 14, 1990. It was not until the date of the scheduled DEC hearing that respondent finally filed his answer to the complaint. 1T4.

Because the grievant, Felix Mendoza, failed to appear at the August 14, 1990 hearing, the matter was adjourned. The hearing was thereafter continued to February 7, 1991. On that date, respondent readily admitted having received the formal complaint, as well as

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[2] 1T denotes the transcript of the February 7, 1991 DEC hearing. 2T designates the transcript of the DEC Report/Decision. Both the hearing transcript (1T2, 10) and the DEC decision (2T2, 5) improperly recite the date of the complaint as September 6, 1989.

the October 10, 1989 and the July 11, 1990 amendments. 1T3. When questioned as to why he failed to file his answer until August 14, 1990, respondent replied that his inaction was predicated upon his past experience with the ethics committee. Respondent had had a prior ethics complaint filed against him. He claimed that he had filed an answer in the earlier matter and that, as a result thereof, a new charge had been "put in" against him at the hearing. Respondent asserted that he would have been better off in that prior matter, had he not filed an answer. 1T28. The DEC did not credit respondent's rationale, and found that respondent had violated RPC 8.1(b) and R. 1:20-3(i).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusion of the DEC in finding respondent guilty of unethical conduct is fully supported by clear and convincing evidence. Although the Board finds it hard to comprehend why a defendant, who had been adjudged as indigent, would feel compelled to pay for legal services that were to have been provided free of charge, the record is devoid of any testimony reflecting undue coercion or wrongdoing on that score. Similarly, because the DEC did not make any findings of credibility, the Board cannot conclude, on the basis of the record before it, that Mendoza's testimony regarding the fee agreement was more believable than that of respondent.

The evidence presented at the DEC hearing showed that respondent never billed the public defender for any work he had completed in the Buitron matter. Exhibit R-1. The propriety of a pool attorney subsequently being retained privately by an indigent client was neither questioned, nor was there any evidence presented on the issue. The Board is, therefore, precluded from making any findings on that issue. Based on the foregoing, the DEC properly found that the record did not clearly and convincingly establish that respondent had violated RPC 8.4(c) (misrepresentation or fraud).

With regard to the charge contained in the letter-amendments to the formal complaint, there is clear and convincing evidence that respondent violated RPC 8.1(b), in that he failed to respond to a lawful demand for information from a disciplinary authority. Respondent admitted having received the formal complaint and the two amendments, charging him with a violation of RPC 8.1(b), for failing to file an answer. Nearly an entire year elapsed before respondent finally filed his answer. Respondent's inadequate explanation for the excessive delay was his dissatisfaction with the disposition of an answer he had filed in an earlier ethics matter. The record does not reflect that respondent exhibited any remorse for the delay. To the contrary, respondent attempted to justify his inaction and his disregard of the Court rules.

Cases of failure to cooperate with a disciplinary authority, unaccompanied by additional unethical conduct, have generally resulted in private reprimands. In more serious situations, the

Court has determined that a public reprimand is appropriate. For example, in the situation where an attorney failed to reply to an investigator's requests for information and thereby thwarted the completion of the investigation, failed to file an answer to the complaint, and did not appear at the committee hearing, a public reprimand was imposed. In re Skokos, 113 N.J.389 (1988).

Similarly, a public reprimand was imposed in In re Macias, 121 N.J. 243 (1990). In that matter, a random audit of the attorney's trust records was conducted. As a result, thirteen deficiencies were found. The Office of Attorney Ethics ("OAE") notified the attorney of the deficiencies and directed him to send a certification that they had been corrected. Thereafter, the attorney ignored three letters from the OAE, for a period of six months. He eventually submitted an inadequate certification. Three more letters issued from the OAE regarding the inadequate certification. These letters were totally ignored. The attorney also failed to file an answer to the formal complaint. The attorney did, however, attend the district ethics committee and the Board hearings.

While "the above cases are helpful in suggesting the scope of appropriate discipline," each disciplinary case must be considered based on its individual facts. In re Lunn, 118 N.J. 163, 167 (1990). It is well-settled that discipline is generally regarded as non-punitive. In re Goldstein, 116 N.J. 1,6 (1989). The severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant

circumstances. Id. at 6; In re Rogovoy, 100 N.J. 556, 565 (1985); In re Nigohosian, 88 N.J. 308, 315 (1982). While mitigating factors are relevant, In re Goldstein, supra, 116 N.J. at 6, an attorney's prior disciplinary history will also be considered as an aggravating factor. In re Vincenti, 114 N.J. 275, 285 (1989).

Respondent has a history of prior discipline. On September 18, 1990, he was suspended from the practice of law for a period of three months, for failing to cooperate with the committee investigator, in violation of RPC 8.1(b);[3] for failing to communicate adequately with clients; for making misrepresentations to a client; for lack of due diligence; for gross neglect and for pattern of neglect. These violations stemmed from his conduct in two separate matters. Respondent also received a public reprimand on January 10, 1990, for sending a letter containing deliberate misrepresentations to a trial court, during his own divorce proceedings, a violation of RPC 3.3(a)(i). At present, respondent is temporarily suspended for failing to cooperate with a demand audit from the Office of Attorney Ethics ("OAE"). The temporary suspension was to run contemporaneously with his three-month suspension, until such time as he was willing to cooperate with the OAE. While respondent finally has cooperated with the OAE he has only recently applied for reinstatement to the practice of law.

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[3] Although the Supreme Court order suspending respondent does not specifically refer to respondent's failure to cooperate with an investigator as a reason for his suspension, the order adopted the report and recommendation of this Board, which explicitly found such violation.

Were it not for the respondent's past conduct, the instant violation would likely warrant a private reprimand. However, respondent's repetitive failure to cooperate with the disciplinary authorities demonstrates his disregard for the ethics process. His lack of contrition for his wrongdoing, as well as his failure to appear before the Board in this matter, further demonstrates his total indifference to the rules of professional conduct. The Board has considered respondent's prior disciplinary history and finds it to be a significant aggravating factor. The Board is mindful of the Court's repeated warnings to the members of the bar that "[a]n ethics complaint should be considered . . . as entitled to a priority over any matter that the lawyer may have in hand that can possibly be postponed." In re Kern, 68 N.J. 325, 326 (1975). The Board has, therefore, closely scrutinized respondent's past and present conduct with regard to his indifference to the courts and to the ethics authorities and has concluded that a public reprimand should be imposed herein. The Board unanimously so recommends. Two members did not participate in the decision.

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

Dated: 10/3/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board