Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-105
91-084
91-085

IN THE MATTER OF :
ROBERT T. NORTON, :
AND :
RICHARD H. KRESS, :
ATTORNEYS AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 25, 1991

Decided: December 9, 1991

Richard F. Collier, Jr. appeared on behalf of the District XIII Ethics Committee.

Joseph W. Spagnoli appeared on behalf of Robert T. Norton.

John P. McDonald appeared on behalf of Richard H. Kress.

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

This matter is before the Board based upon a recommendation filed by the District XIII Ethics Committee ("DEC") that each respondent be privately reprimanded.

Robert T. Norton was admitted to the New Jersey bar in 1972. He is currently a partner in the firm of Norton and DeRose, with offices at 114 Elm Street, Westfield, New Jersey. Richard H. Kress was admitted to the New Jersey bar in 1979. His office is located at 77 Brant Avenue, Clark, New Jersey. Kress is currently, and has

been since 1982, the municipal prosecutor for Clark Township. The within ethics charges against both respondents stem from their conduct in the Donnelly matter, which involved the improper disposition of several motor vehicle violations.

From July 1987 to June 1988, Norton and Kress were partners in the firm of Norton, DeRose, Hamilton and Kress, located at 114 Elm Street. Pursuant to an informal agreement, the partnership was to run for a trial period of one year. At the expiration of the year, Norton and Kress dissolved their partnership (Exhibit C-36). Kress, however, continued to rent office space from Norton until approximately April 1990, the month after the Donnelly matter was heard in Clark municipal court.

The partnership apparently had begun to experience difficulties within a few months of its inception, due to the vast differences in business management styles between Norton and Kress. Kress claimed that, at the end of the trial year, by memorandum dated June 30, 1988, Norton unilaterally terminated the partnership. 3T193.[1] While purportedly there were ill-feelings between them, Kress nevertheless continued to rent office space from Norton for nearly two years after the dissolution of the partnership.

[1] 3T denotes the transcript of the DEC hearing of December 27, 1991.

Kress testified that, following the break-up, he remained in the same building and, in fact, in the same office. While he had hung a door to create a physical barrier between the two offices, it was still possible to obtain access from his firm to Norton's, through the shared library. 3T222. The library was, on occasion, used as a conference room. Kress also had access to Norton's facsimile machine. Norton and Kress did not share expenses; rather, Kress paid rent to Norton for office space and utilities. Their files and accounts were separated. They obtained separate phone numbers and letterhead and Kress obtained his own post office box. New signs were hung to indicate that a change in the firm had occurred. While, initially, there was animosity between the two, Kress characterized his relationship with Norton, by March 1990, as "not unfriendly, but they didn't go out of their way to do anything for one another." 3T196.

Their involvement in the Donnelly matter arose as follows: Norton had been retained to defend his friend, Joseph Donnelly, also an attorney, after Donnelly's arrest on January 30, 1990, in Westfield, New Jersey. Donnelly was charged with several motor vehicle violations, the most serious of which was driving while under the influence of alcohol ("DWI"), in violation of N.J.S.A. 39:4-50.

On the night of the arrest, Officers Gallagher and Luce observed Donnelly traveling at a high rate of speed, making a left-hand turn into the wrong lane of traffic and running a stop sign. The officers stopped Donnelly. When they approached his vehicle,

they detected a strong odor of alcohol on his breath. Donnelly admitted that he had had a few drinks that evening and asked the officers to let him go. At the scene, the officers had Donnelly participate in several psycho/physical tests, the results of which indicated that he was under the influence of alcohol. Donnelly was then placed under arrest and read his Miranda rights. The officers transported Donnelly to police headquarters, where he was processed. Thereafter, Donnelly was videotaped receiving his Miranda rights again and performing the psycho/physical tests that had been administered earlier at the scene.[2] Afterwards, Donnelly was subjected to a breathalyzer test, the results of which were .16 and .15, well above the legal limit.

Norton was a close friend of Donnelly and agreed to defend him free of charge. Shortly following Donnelly's arrest, Norton, on several occasions, unsuccessfully attempted to telephone Officer Gallagher at the Westfield police station. Eventually, Norton visited the station, where he finally met with the officer. According to Gallagher, he and Norton had a brief conversation. Norton spoke to him as if they had been old friends (apparently, they had not known each other prior thereto). Norton informed Gallagher that he was a good friend of Donnelly. Norton also

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[2] According to Gallagher, Donnelly's performance of the psycho/physical tests was the same at headquarters as at the scene. A review of the tape clearly demonstrates that, standing alone, it was not sufficient to establish that Donnelly was actually intoxicated. Donnelly did not stumble or lose balance, as was stated in Gallagher's report. He did, however, appear to be very tired and seemed to concentrate very intently on the tests he was requested to perform. Exhibit C-5.

mentioned that he was a friend of one of the detectives from the Westfield police station, as well as of a number of people throughout the department. Norton added that they played basketball and participated in other activities together. Norton represented himself as being a friend to police officers. 2T49.[3] Gallagher also recalled that Norton had mentioned that Donnelly was a 200 Club member (an organization of civilians who actively support state police and firemen). Norton's goal in visiting Gallagher was unmistakable: to influence the officer. In fact, Norton asked Gallagher to give his friend Donnelly a break.

The Donnelly matter was to have been tried in Westfield Municipal Court. Shortly after Norton met with the officer, however, he set out to obtain a change of venue for Donnelly's case. The reason proffered by Norton for doing so was that Donnelly did not want either the judge from Westfield or the judge from Mountainside to hear his case, because they were all members of the same golf club and because Donnelly was very concerned about his reputation in the community. Allegedly, Donnelly did not wish to be embarrassed in either Westfield or Mountainside.

Pursuant to a 1986 transfer order of the Honorable Edward W. Beglin, Jr., A.J.S.C. (Exhibit C-1), in the event of the disqualification of the municipal judge of Westfield, cases were to be transferred to Mountainside first, Springfield second and Plainfield third. Clark was not listed as an alternate venue for

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[3] 2T denotes the transcript of the DEC hearing of December 19, 1990.

Westfield cases. Norton claimed that it was his understanding that Westfield cases went either to Mountainside or Clark. It is curious that, while Norton was aware that Mountainside was the first alternate venue for Westfield, he was unaware of other acceptable venues.

After his meeting with Gallagher, Norton contacted the Westfield court clerk and tried to convince her to transfer the Donnelly matter by informing her that Donnelly was friendly with the judge and that, therefore, it would be inappropriate for him to hear the matter.[4] According to the statement obtained from the Westfield judge, Donnelly was not his friend and, in fact, he did not even know Donnelly. Norton had called the judge at his law office to advise him that Donnelly was a member of the Echo Lake Country Club and that, therefore, he should not hear the matter. The judge reiterated that he did not know Donnelly. Norton then claimed that, because Donnelly's son and the judge's son played golf together, Donnelly would be embarrassed if the judge heard the matter. The judge was eventually persuaded that, in order to prevent an appearance of impropriety, he should have the matter transferred.

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[4] The Union county prosecutor's office conducted an investigation of the dismissal of Donnelly's DWI charge. A statement was obtained from, among others, the Westfield judge. Exhibit C-13. The investigation was commenced after Judge Beglin discovered that the DWI charge had been dismissed. He referred the matter to the prosecutor's office for further investigation. No criminal charges were filed as the result of the investigation. The Westfield police department also conducted an investigation, but had held any disciplinary charges in abeyance, pending the outcome of all other matters.

Apparently, on the very next day, Norton wrote to the Westfield court clerk (Exhibit C-7) and advised her that the matter should be transferred to Clark, since the judge from Mountainside could not hear the matter either. As noted above, Clark was not an alternate venue for Westfield. Nevertheless, Norton's letter to the clerk instructed her to transfer the matter to Clark, instead of requesting that she transfer the matter to the proper venue.

Indeed, Norton accomplished the improper transfer of the case to Clark by claiming, in his letter to the clerk, that the Mountainside judge could not hear the Donnelly matter for the same reason that the Westfield judge had been disqualified. Norton, however, failed to contact the Westfield judge to obtain his consent for a transfer to a different venue. What Norton failed to inform the clerk was that earlier, on March 1, 1989, the Mountainside judge had heard an earlier motor vehicle case involving Donnelly. Norton had represented Donnelly in that matter as well. Apparently, Donnelly had been charged with careless driving for crossing over a yellow line in Echo Lake Park. Norton testified that the case "was . . . minor in nature," that there were no other vehicles or pedestrians around when the incident occurred and that, since it was a winding road, the prosecutor "couldn't prove there was any careless activity." 3T104. The matter was dismissed.

Pursuant to Norton's improper instructions, the Westfield court clerk transferred the matter to Clark, not to Springfield, which was the proper alternate venue. Her error was understandable because, on occasion, the Clark municipal judge and the Westfield municipal judge would preside over one another's cases when conflicts or other difficulties existed. Another alternative to transferring the case would have been to have one of the judges assigned to hear conflicts preside over the matter in the Westfield municipal court.

In the earlier matter of March 1, 1989, the municipal prosecutor of Mountainside was, at that time, representing Norton in a securities matter. On the record in that matter, Norton notified the court that there was an attorney/client relationship between himself and the Mountainside prosecutor. Yet, despite his awareness of the duty to inform the court of all circumstances relevant to the earlier Mountainside case, in the Donnelly matter Norton failed to disclose to the Clark municipal judge similar information regarding his former partnership with Kress and the fact that they were still practicing law in adjoining offices.

On the evening of the hearing in the Donnelly matter in Clark, there were discussions among Kress and the police officers, among the officers and Norton, between Kress and Norton and between Kress and the judge. Norton and Kress admitted that, on the day of the hearing, as well as several days prior thereto, they talked about the Donnelly matter. They alleged, however, that their conversations had been unrelated to any substantive issues.

On the day of the scheduled hearing, March 29, 1990, Norton obtained a facsimile copy of a certificate of analysis (Exhibit C-9) from the law firm of Irwin and Post, a defense firm with which Norton was acquainted. The purpose of that certificate, as well as several other certificates that he had obtained, was to discredit the breathalyzer results. The testimony at the DEC hearing regarding who had shown the certificate to whom first was as widely divergent as the testimony on who had suggested that it should be used in an attempt to have the DWI charge dismissed. It is undisputed, however, that the two police officers and both Norton and Kress reviewed the certificate on the night of the hearing and that everyone determined it was not a viable defense.

Ultimately, the use of the certificate was unnecessary because it was agreed that the officers would not proceed with the DWI charges. Kress contended that Gallagher had told him that he wanted to "give Donnelly a break." Gallagher contended that it had been Kress' idea not to proceed with the DWI charge. The testimony of neither Gallagher nor Kress was particularly persuasive or believable. What is believable is that Norton was the impetus for the dismissal of the charge. He either convinced the two officers, or Kress, or all three, not to proceed with the charge. The only fact that the officers, Kress and Norton agreed upon was that Kress and the officers had realized that the evidence against Donnelly was strong, despite the fact that the videotape could not conclusively establish that Donnelly was intoxicated. See, i.e., 3T122; Exhibit C-14 at 3, 11, 12 and 18.

Kress testified that, on March 29, 1990, he had an ex parte communication with the Clark municipal court judge, to notify him that the officers did not wish to proceed with the DWI charge. Kress claimed that he had informed the judge that the charge involved was a DWI charge. According to the judge's statement, however, generated from the investigation of the Union County Prosecutor's Office (Exhibit C-18), the judge was unaware that the dismissed charge involved a DWI. He claimed that Kress had never advised him and that "frankly, [he] didn't bother to look at the . . . summons . . . [he] was confronted with law enforcement officers from out-of-town who would want to move to dismiss it." (Exhibit C-18 at 5). The judge indicated that, had he known it was a DWI, he would have looked into the matter.

Following his conversation with Kress, the judge read the charges against Donnelly into the record, including " operating a motor vehicle, influence of an alcoholic beverage [sic]". Exhibit C-10. Kress also notified the judge, on the record, that "[a]s to the charge, 39:4-50, the State will move to dismiss that summons." While the judge had sufficient information before him to conclude that the matter involved a DWI charge, he nevertheless failed to explore the reason why the State did not wish to proceed with the charge. Norton entered a guilty plea to the other two charges on behalf of his client.

At the time of the Donnelly hearing, plea bargaining of drunk driving cases was strictly prohibited by Order of the New Jersey Supreme Court, Directive #9-1988, 125 N.J.L.J. 170 (1989). Both

Norton and Kress denied that the DWI charge had been dismissed as the result of a plea agreement. Yet, it is clear that neither respondent appeared prepared to go ahead with a trial. Indeed, neither bothered to review the videotape prior to the hearing to assess the quality of the evidence. At the DEC hearing, Norton testified that, although he had intended to produce witnesses on his client's behalf, there were no witnesses present on the night of the Donnelly matter. Norton also testified that, a day or two before the Donnelly case, his defense in the matter would have been that the breathalyzer results should have been excluded because the certification for the ampules was flawed. Prior thereto, he had intended to prove that "Donnelly was not intoxicated, that the breathalyzer reading was clearly not consistent with how much he had to drink." 3T164. Norton, however, had failed to obtain an expert witness and, as noted above, had not even viewed the videotape of Donnelly.

The DEC concluded that the testimony presented at the hearing had ranged from "unbelievable to incredibly unbelievable." 3T247. Detective Lieutenant Tracy, from the Westfield police department, was called to testify at the DEC hearing. His testimony substantially discredited the testimony of officers Gallagher and Luce, the arresting officers. His testimony may, however, have been tainted by the fact that he was Norton's friend and that he had known Kress since 1956. Exhibit C-17 at 13.

As a result of the foregoing conduct, Norton and Kress were charged, in separate complaints, with a number of ethics

violations. Norton was charged with improperly accomplishing the transfer of his client's case; with violating the office association rule (Opinion No. 74, 88 N.J.L.J. 357 (June 3, 1965)); with failing to disclose the existence of a plea agreement in a DWI case; and with participating in the improper dismissal of the drunk-driving charges against his client. Kress was charged with the identical violations, excluding the improper transfer of the Donnelly matter.

The DEC concluded that there had been no plea bargain struck between Norton and Kress. It found, as to Norton, technical violations of R.1:15-3(b) (prohibiting a municipal attorney from representing any defendant in the municipality thereof) and R.1:15-4 (extending the prohibition of R.1:15 to an office associate); RPC 1.16(a)(1) (representing a client in violation of the Rules of Professional Conduct or of the law); and a technical violation of RPC 8.4(d) "by allowing a situation which gives the appearance of impropriety." Panel Report at 11. As to Kress, the DEC found technical violations of RPC 1.16(a)(1) (because of his association with Norton); RPC 8.4(d) (for allowing a situation giving rise to the appearance of impropriety); and a technical violation of RPC 1.16(a)(i) (for failing to disclose to the judge all material facts concerning the reason for the disposition). The hearing panel recommended that each respondent receive a private reprimand.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the DEC's findings that the respondents were guilty of unethical conduct are supported by clear and convincing evidence. The Board disagrees, however, with the DEC's conclusion that the record does not support a finding that the DWI charge against Donnelly was dismissed as a result of a plea bargain. The Board further disagrees with the DEC's recommendation for private reprimand, and concludes that public discipline is necessary for both respondents.

The respondents' improper conduct began with Norton's machinations to steer the case to a friendly forum and ended with Kress' failure to ensure that the case proceed to trial. The inescapable conclusion is that both Norton, as defense counsel, and Kress, as prosecutor, played a very significant role in orchestrating the improper dismissal of the DWI charge against Donnelly. This is bolstered by the fact that the evidence against Donnelly was strong and substantial and that neither Norton nor Kress had prepared for the trial of the matter.

In the Board's view, as to these two respondents, Norton's conduct was more serious than Kress'. Norton's wrongdoing began with the manner in which he accomplished the transfer of the case to the Clark court. It was fraught with irregularities from its inception. His contention that he had honestly thought that Clark was the proper alternate venue is simply not credible. He was

clearly seeking a friendly forum. To this end, he initially made misrepresentations to the clerk about Donnelly's relationship with the Westfield judge; thereafter, he failed to contact the Mountainside judge to request a transfer from that court; he also failed to inform the Westfield clerk of the fact that Donnelly had once appeared as a defendant before the Mountainside judge, which would have called into question his claim of a conflict (Norton's defense was that the first motor vehicle violation was not serious and would not cause the same harm to Donnelly's reputation as the DWI charge). Norton's conduct was the impetus leading to the dismissal of the DWI charge, by persuading the officers that they should give his client a break. Finally, Norton failed to notify the Clark judge of his office association with Kress. Norton's actions were orchestrated for the sole purpose of transferring the Donnelly matter to Clark, where Norton could obtain a more favorable result from Kress, his office associate. Had Norton advised the Clark court of the conflict, perhaps another prosecutor would have been assigned to the matter, stymieing Norton's efforts to engineer a dismissal.

Kress' participation in the improper dismissal of the DWI charge was also serious. As prosecutor, the holder of a position of public trust, he had a duty to comply with the New Jersey Supreme Court Directive #91-1988 by, at a minimum, putting the arresting officers on the stand to testify as to their factual basis for not wishing to proceed with the matter. Kress also was

derelict in his duty to notify the judge of his office association with Norton.

It is unquestionable that both Norton and Kress participated in a scheme to have the DWI charge against Donnelly dismissed, contrary to Directive #91-1988. It is also unquestionable that both failed to advise the Clark court of their office association. Notwithstanding that their partnership had dissolved, they had once been partners and still shared adjoining office space; as such, they were office associates. Nevertheless neither one of them notified the court of their past relationship and of their continuing office arrangement.

Pursuant to Opinion No. 74, 88 N.J.L.J. 357 (June 3, 1965), the term "office associate" as used in R. 1:26, includes attorneys who share common office facilities. A shared conference room comes within that definition. Since Norton and Kress used their common library as a conference room, they must be deemed office associates. Opinion No. 74 precludes an office associate from practicing before the municipal agencies of the municipality in which his office associate was the municipal attorney. The opinion was generated as the result of an inquiry regarding two attorneys who had dissolved their partnership a year earlier, but continued to maintain offices in the same small office building and in the space formerly used by the firm. Therefore, Norton's appearance in Clark, where his former partner was the prosecutor violated Opinion No. 74. See also Opinion 185, 93 N.J.L.J. 505 (July 9, 1970); Opinion No. 406, 102 N.J.L.J. 353 (October 19, 1978).

Having concluded that Norton's and Kress' conduct was unethical, the Board must recommend discipline that is commensurate with the gravity of the ethics offenses in each instance.

In In re Spitalnick, 63 N.J. 429 (1973), an attorney, who was also a municipal court judge, participated in the "fixing" of a properly issued traffic summons for a DWI charge. The attorney advised the defendant to write a letter to the court explaining that he was suffering from a physical condition at the time he received the summons. The defendant failed to proffer such an explanation and also failed to appear in court. The attorney, thereafter, provided the presiding municipal judge with a dubious medical explanation for the defendant's condition and also persuaded the judge to sign the ticket "not guilty." As the result of the disciplinary charges brought against him, the attorney forfeited his position as a municipal judge and received a two-year suspension from the practice of law. In suspending the attorney's license, the Court found that it could not permit the integrity of the judicial process to be compromised in any way by a member of either the bench or bar. The Court stated:

> Nowhere can the community be more sensitive to the regularities - and irregularities - of judicial administration than at the local level. While on the grand scale of events a traffic violation may be of small significance, the corruption of judicial administration of a Municipal Court is of particular importance. Such conduct, visible and apparent to the community, destroys the trust and confidence in our institutions upon which our entire governmental structure is predicated. We cannot and will not tolerate

> members of the profession subverting judicial integrity at any level, for the damage is irreparable.
>
> [Id at 432.]

In In re Terkowitz, 76 N.J. 329 (1978), an attorney, who was also the former judge of the municipal court, in which a ticket fix occurred, received a one-year suspension. The attorney participated in the improper dismissal of his secretary's traffic summons for improperly passing a school bus by contacting the presiding municipal judge, to inform the judge of his secretary's physical problems and of the fact that her view had been obstructed, when she had improperly passed the bus. There was no court hearing in the matter. The presiding judge, nevertheless, entered a judgment of not guilty and inserted on the summons "'testimony that . . . defendant states view was obstructed by trees . . . .'" The acquittal was based solely on the information that the judge had received from attorney Terkowitz. Thereafter, the judge and the attorney participated in a cover-up of the wrongful dismissal of the case, by engineering the preparation of an affidavit, signed by the secretary, explaining the circumstances surrounding the receipt of her summons. The affidavit contained a backdated acknowledgment and false jurat. The affidavit was used by the judge in connection with the county prosecutor's investigation into the dismissed summons. The judge resigned from the bench and also received a one-year suspension for his participation in the wrongdoing. See In re DeLucia, 76 N.J. 327 (1979). See also In re Wieshoff, 75 N.J. 326 (1978) (where a

municipal prosecutor received a one-year suspension for participating in the improper disposition of a traffic ticket).

In another case dealing with improper conduct by a municipal prosecutor, In re Whitmore, 117 N.J. 472 (1990), the prosecutor failed to inform the court that he had a "well-grounded suspicion" that a police officer who had conducted a breathalyzer test had an improper motive for not making himself available to testify. The Court imposed a public reprimand, reasoning that it need not be shown that the failure to disclose a material fact to the court actually caused an improper disposition of the case. It is sufficient that "nondisclosure would 'tend to mislead' the court." Id. at 477.

These cases clearly demonstrate that sanctions are imposed against all involved in improper dismissals; the judges, the prosecutors and even defense counsel. Aggressive litigation on behalf of a client, does not exempt defense counsel from discipline, where, as in this case, the aggressive or overzealous litigation tactics also involve unethical conduct. In this matter, the respondents' conduct was indeed serious and greatly impeded the administration of justice. It also undermined the public confidence in the judicial system by fostering the impression that justice is not administered evenhandedly. Respondents' actions conveyed the intolerable perception that knowing the right people in the right places can achieve more favorable results. Kress' conduct in this regard violated RPC 1.16(a)(1) and RPC 8.4(c) and

(d). Norton's conduct also violated RPC 8.4(d) and (f), RPC 1.16(a)(1), R. 1:15-3(b) and R. 1:15-4.

There remains, thus, the issue of the appropriate measure of discipline for these respondents. The Board finds that Kress' conduct was more serious in nature than attorney Whitmore's, supra. Kress was an active participant in a scheme to violate Directive No. 91-1988, which prohibits plea agreements in drunk driving cases. A requisite majority of the Board (four members) therefore recommend that he receive a three-month suspension. As to Norton, the Board majority recommends that a six-month suspension be imposed, in light of his more extensive and significant role in accomplishing the improper dismissal of a DWI case. See In re Terkowitz, 76 N.J. 329 (1978); In re Spitalnik, 63 N.J. 429 (1973). The Board considered, in mitigation, that no disciplinary infractions had been sustained against either Norton or Kress since their admission to the bar in 1972 and 1979, respectively. Three Board members recommended a public reprimand for each attorney. Two members did not participate.

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

Dated: 12/9/1991

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board