

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 89-30

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

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 19, 1989

Decided: October 11, 1989

Edward R. Doughty appeared on behalf of the District I Ethics Committee.

Respondent waived appearance for oral argument.

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 I Ethics Committee.

The Servais Matter

In March 1987, respondent was retained by Richard Servais, Sr., to complete his representation in a personal injury suit against Resorts International Hotel/Casino. The suit had been previously settled for \$17,500. On March 12, 1987, Mr. Servais' former counsel transmitted to respondent a trust account check in the amount of \$4,966.94. On March 20, 1987, former counsel sent a list of outstanding medical bills totaling \$5,117.94. Respondent

accepted the check with the understanding that he was to negotiate compromises for as many of the remaining bills as possible and forward the balance, if any, to Mr. Servais. Included in the list was a bill from Dr. Ronald Fisher, Mr. Servais' treating physician, in the amount of \$625.

By letter dated March 23, 1987, respondent wrote to Dr. Fisher inquiring whether he would accept \$400 instead of the \$625 owed. Dr. Fisher responded with a letter stating that he would not compromise his fee and advising that the balance owed was \$875.

Thereafter, respondent (1) successfully negotiated the settlement of one of the bills; (2) discovered that another had already been written off; (3) paid all the remaining bills, except Dr. Fisher's; (4) settled an unrelated matter in behalf of Mr. Servais; (5) took a fee for his representation in the unrelated matter; and (6) took a fee for his work in the instant case. Respondent then transmitted the balance of \$1,386.94 to Mr. Servais. All monies respondent received from Mr. Servais' former counsel were, thus, disbursed without any payment to Dr. Fisher.

At the committee hearing, respondent testified that Mr. Servais had directed him not to pay Dr. Fisher's bill because, during the early stages of the case, Mr. Servais and his former counsel had been dissatisfied with the state of Dr. Fisher's treatment records. Mr. Servais denied that he had instructed respondent not to pay Dr. Fisher's bill. Mr. Servais testified that it was his belief that all the medical bills had been previously paid by his former counsel.

The committee found that respondent received funds in which a third party had an interest and refused to deliver those funds to the third party. The committee also found that, because respondent withdrew fees in payment for his representation in two separate matters from the funds sent by Mr. Servais' former counsel, both respondent and other parties claimed an interest therein. The committee further found that money owed to Dr. Fisher had not been segregated and, in fact, had been taken as legal fees by respondent. The committee concluded that respondent's conduct violated RPC 1.15(b) and (c).

RESPONDENT'S MATRIMONIAL MATTER

In April 1987, respondent was served with a notice of motion filed by his wife's attorney, seeking judgment against respondent for approximately \$6,500 for support arrearages, equitable distribution monies and legal fees. On April 6, 1987, respondent filed a cross-motion with a supporting certification listing his assets. These assets included a computer, a financed automobile, and two unimproved lots. The lots were valued at \$32,500, with mortgages thereon totaling \$19,000.

On April 9, 1987, the day before the hearing scheduled by the court, respondent transferred the two unimproved lots to his mother by quitclaim deed, for no consideration. Respondent did not disclose the conveyance to the court or to opposing counsel. Neither did he amend the certification which he had submitted to the court.

Immediately preceding the April 10, 1987 hearing, the judge held a settlement conference in chambers. At no time during the unsuccessful negotiations did respondent advise the judge or opposing counsel that he had transferred the real estate to his mother. It was only during the hearing, when the judge began to ask him questions about the property, that respondent finally admitted that he no longer owned it.

At the committee hearing, respondent admitted that he transferred the two lots to his mother the day before the hearing in order to avoid the entry of a judgment thereon. The committee found that respondent violated RPC 8.4(c), by displaying conduct involving dishonesty, fraud, deceit, or misrepresentation, and RPC 8.4(d), by exhibiting conduct prejudicial to the administration of justice. Based on the totality of his conduct in the matrimonial matter and in the Servais matter, the committee recommended that respondent receive 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.

In the Servais matter, respondent was entrusted with funds designated for the purpose of paying Mr. Servais' outstanding

medical bills. Mr. Servais' former counsel transmitted his trust account check with specific instructions for the disposition of the monies. Respondent, however, disregarded those instructions and disbursed the funds arbitrarily, in the face of his knowledge that Dr. Fisher had an unpaid claim. Respondent's acceptance of the funds gave rise to his obligation to segregate the disputed amount, an obligation he totally disregarded. Respondent's failure to segregate the funds in light of a third party's interest therein was further aggravated by the fact that he, too, had an interest in the funds, as shown by his ultimate withdrawal of legal fees.

At the ethics committee hearing, respondent testified that Mr. Servais had instructed him not to pay Dr. Fisher's bill. T65-20 to 25.¹ Mr. Servais' testimony, however, directly conflicts with respondent's. In response to a question whether he ever advised respondent not to pay Dr. Fisher, Mr. Servais testified, "[n]ot that I recall." T56-19 to 21. It is obvious that the committee considered Mr. Servais' testimony to be more credible. The Board accorded great weight to the committee's conclusion. As the ultimate fact finder, the committee had the opportunity to observe the demeanor of the witnesses and to assess their credibility. Accordingly, the Board defers to the committee's finding that respondent unilaterally decided not to pay Dr. Fisher's bill. The Board finds that respondent's failure to

¹ T refers to the transcript of the district ethics committee hearing held on October 11, 1988.

segregate funds in which he and a third party shared an interest violated RPC 1.15(b) and (c).

In respondent's matrimonial matter, he swore to the court that his assets included two unimproved lots. However, the day before the hearing seeking judgment against him, respondent transferred the property to his mother to decrease the value of his existing assets. Respondent blatantly attempted to defraud both the court and his wife. This serious misconduct directly undermined the administration of justice. Matter of Kushner, 101 N.J. 397, 403 (1986).

Moreover, although during the matrimonial hearing respondent finally admitted that he had transferred the property, he did not do so voluntarily, but only in response to the court's questions about the property. The Board finds that respondent's conduct involved dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c). Additionally, the Board finds that respondent violated 8.4(d) by exhibiting conduct prejudicial to the administration of justice. Finally, respondent's failure to notify the court of the transfer violated his duty of candor toward the tribunal. RPC 3.3(a)(1) and (5).


In all disciplinary matters, public confidence in the bar requires that sanctions be commensurate with the seriousness of the transgressions. The purpose of discipline, however, is not to punish the attorney, but to protect the public from the attorney who does not meet the standards of responsibility required of every member of the profession. Matter of Templeton, 99 N.J. 365, 374

(1985). The quantum of discipline must accord with the seriousness of the misconduct in light of all relevant circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982).

While mitigating factors are therefore relevant and may be considered, In re Hughes, 90 N.J. 32, 36 (1982), respondent advanced no such circumstances in his defense. The Board searched for mitigation, but found none. Accordingly, based on the totality of respondent's conduct, as well as respondent's prior disciplinary history which the Board considered as an aggravating factor,² a requisite majority of the Board recommends that respondent be suspended from the practice of law for a period of three months. Two members would recommend a public reprimand. Two members did not participate.

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

Dated: 10/11/89


Raymond R. Trombadore
Chair
Disciplinary Review Board

² On December 2, 1986, respondent received a private reprimand for his dual representation of buyer and seller in the sale of a business without full disclosure to both parties of the potential conflict of interests inherent in such representations and the risks involved.