

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 87-90 and 88-103

IN THE MATTER OF :
:
PETER M. CERVANTES :
:
AN ATTORNEY-AT-LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 16, 1989

Decided: October 11, 1989

The District VIII Ethics Committee waived appearance for oral argument.

Respondent appeared pro se.

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

This matter is before the Board based upon two presentments filed by the District VIII Ethics Committee.

The Capiello Matter

In early 1980, Josephine Capiello retained respondent to file a workers' compensation claim against her late husband's employer. Mr. Capiello had died of aplastic anemia in September 1979. After retaining respondent, Mrs. Capiello moved to Nevada, first asking respondent if such a move would adversely affect the claim she had asked him to pursue. Respondent assured her that it would not, and that he would communicate with her brother-in-law, who could provide necessary information on this matter. Respondent did, in fact, have one meeting with the brother-in-law.

Between 1980 and 1984, Mrs. Capiello made repeated telephone inquiries regarding the status of this matter. Respondent neither took her calls, nor complied with her wishes that he call her collect or communicate with her by mail. During one of these calls to respondent's office, Mrs. Capiello was informed that "the case is on the calendar. You will have to wait between one and two years before it comes up" (T5/27/87 12-22 to 25, 13-1 to 3). In fact, nothing had been filed by respondent on Mrs. Capiello's behalf.

Mrs. Capiello did not pay respondent a retainer fee or sign a retainer agreement. However, she testified that she gave him \$150 for hospital records (T5/27/87 13-12 to 16).

The committee found that, although respondent was negligent, his conduct did not rise to the level of gross negligence. The committee did find that a misrepresentation had been made to Mrs. Capiello regarding the filing of a petition on her behalf, and that respondent was guilty of dishonesty, deceit, and misrepresentation in violation of DR 1-102(A)(4), and (6) and RPC 8.4(c).¹

The Tulala Matter

In June 1978, Martin Tulala retained respondent to represent him in a workers' compensation matter on a contingent fee basis. At that time, respondent informed Mr. Tulala that it would take eighteen months to resolve the matter. After retaining respondent,

¹The Rules of Professional Conduct replaced the Disciplinary Rules, effective September 1984. Respondent's actions occurred before that date. Hence, the Disciplinary Rules apply.

Mr. Tulala received numerous letters from him, twenty of which were dated and one undated, covering the period from June 27, 1980, through August 31, 1984. These letters informed Mr. Tulala of court dates, and indicated that he should contact respondent prior to the court date to see if Mr. Tulala's appearance would be necessary. Mr. Tulala testified that, during those months, he attempted to communicate with respondent by phone 300 times, but respondent returned his calls on a few occasions only (T10/16/85 14-15 to 25, 15-1 to 9). In addition, Mr. Tulala testified that he went to respondent's office 40 times, that he saw respondent there twice, and that often the office was closed (T10/16/85 24-1 to 20). Although Mr. Tulala went to court approximately ten times, respondent appeared only once, at a pre-trial hearing (T10/16/85 11-4 to 17). In September 1984, the matter was dismissed for lack of prosecution. After the dismissal, Mr. Tulala retained another attorney, whereupon the case was reactivated and brought to a satisfactory conclusion.

The hearing panel found that respondent failed to handle the matter in an expeditious manner and failed to communicate with Mr. Tulala.²

²The respondent was charged with violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and (b) and RPC 3.2. The record is not clear as to which specific rules the panel believed respondent violated. In addition, the record is not clear as to when respondent's misconduct ceased with regard to the Tulala matter. If, in fact, it continued past the date of the dismissal of the workers' compensation claim, the Rules of Professional Conduct also apply. However, for all, or practically all of the time of the misconduct, the Disciplinary Rules were in effect.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committees in finding respondent guilty of unethical conduct are supported by clear and convincing evidence.

When retained, respondent owed his clients a duty to pursue their interests diligently. See Matter of Smith, 101 N.J. 568, 571 (1986); Matter of Schwartz, 99 N.J. 510, 518 (1985); In re Goldstaub, 90 N.J. 1, 5 (1982). The Board finds, by clear and convincing evidence, that in the Capiello matter respondent lacked diligence in pursuing the matter in behalf of his client, in violation of DR 7-101(A). Respondent failed to file the claim petition in Mrs. Capiello's behalf, and failed to engage in necessary discovery to determine the potential liability of the decedent's employer. In addition, a misrepresentation was made to Mrs. Capiello concerning the status of the workers' compensation claim, in violation of DR 1-101(A)(4). With regard to the Tulala matter, the Board finds that respondent lacked diligence in his handling of the workers' compensation matter, and failed to act to expedite the litigation, in violation of DR 7-101(A).

The Board also finds that respondent failed to keep Mr. Tulala reasonably informed about the status of this matter, in violation of DR 7-101(A)(2). An attorney's failure to communicate with his clients diminishes the confidence the public should have in members of the bar. Matter of Stein, 97 N.J. 550, 563 (1984).

The purpose of discipline, however, is not the punishment of the offender, but "protection of the public against an attorney who cannot or will not measure up to the high standards of responsibility required of every member 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 the 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 considered respondent's testimony before the hearing panel in the Tulala matter regarding various personal problems he was having during this time, including damage to, and burglary of, his office and the illnesses of respondent and his father. In addition, procedural difficulties in Mr. Tulala's case, including a change of jurisdiction, three changes in judges, and requests for adjournments by opposing counsel added to the delay in this matter.

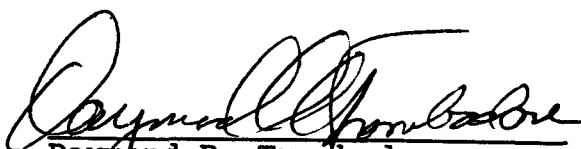
The Board has also considered that respondent is currently not living in New Jersey, and is no longer practicing law. Respondent indicated to the Board that he has "no intentions, at this point, to return to the practice [of law]" (T2/16/89 9-12 to 13).

Respondent's disregard of his ethical responsibilities to his clients, however, cannot be countenanced. The Board is of the opinion that the totality of the within misconduct merits a public reprimand. The Board unanimously so recommends. One member agreed

with the discipline imposed, but would dismiss the Capiello matter for lack of clear and convincing proof of unethical conduct.

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

DATED: 10/11/88


Raymond R. Trombadore
Chair
Disciplinary Review Board