

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-059

IN THE MATTER OF :
ERNEST R. COSTANZO, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 18, 1992

Decided: April 29, 1992

Michael J. Waldman appeared on behalf of the District IV Ethics Committee.

Respondent did not appear¹.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District IV Ethics Committee (DEC). The formal complaint, encompassing nine matters, charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4 (a) and (b) (failure to keep clients reasonably informed and to explain matters so that the individuals could make informed decisions), RPC 1.5(b) (failure to provide a written retainer),

¹Notice of the Board hearing was sent to respondent by regular and certified mail at his most recent address, where respondent had accepted service as late as January 22, 1992. The return-receipt card has not yet been received. Receipt of the regular mail package is presumed since it has not been returned to the Board.

RPC 1.15(d) and R. 1:21-6 (failure to maintain records), RPC 5.5(a) (continuing to represent clients and act as an attorney after suspension), RPC 3.2 (failure to expedite litigation), RPC 3.4(c) failure to obey an obligation under the rules of a tribunal), RPC 7.3(b) (engaging in prohibited advertising) and RPC 7.4 (designating himself as a specialist in a field of law).

The facts of the nine matters are as follows:

The Schaeffer Matter (District Docket No. IV-91-07E)_

In October 1989, Linda M. Schaeffer retained respondent to represent her in a bankruptcy proceeding.² Respondent was paid \$400, which represented part of his fee.³ Respondent filed a petition on Schaeffer's behalf. During the proceeding, in January 1990, the trustee determined that he needed an amendment to the petition. Although respondent first represented to Schaeffer that he would file the amendment and later told her that he had done so, in fact he took no action and Schaeffer's petition was dismissed. According to Schaeffer, respondent told her that the amendment was probably lost in the court system and that they would have to refile it. In June 1990, respondent filed a new petition on

²Respondent and Schaeffer are extended family members and they had discussed the matter one month earlier.

³Respondent was to be listed as a creditor and would be paid the remainder of his fee of \$800 after the proceeding. It is interesting to note that, according to the pleadings filed with the court by respondent, he was paid \$280 and was owed \$520 (Exhibit P-37).

Schaeffer's behalf.⁴ No summary was filed with the petition. As a result, the court issued orders to show cause. The court documents, which include orders for respondent to appear, set out the court's difficulty in getting respondent to comply and to provide necessary information for the second bankruptcy petition. According to Schaeffer, respondent eventually filed the documents on her behalf, between October 1990 and January 1991. He did so out of time. Schaeffer retained another attorney, who completed the matter.

During the pendency of the proceeding, Schaeffer's wages were executed. To his credit, respondent did remedy that difficulty. However, Schaeffer testified that she had difficulty communicating with respondent, who never informed her that he had been suspended in October 1990, although he continued to discuss this matter with her until January 1991.

The Marinelli Matter (District Docket No. IV-91-08E)

Theresa Marinelli retained respondent, after receiving a flyer from him, to represent her in a bankruptcy matter, paying him \$115. Marinelli was, thereafter, unable to reach respondent who failed to make any attempts to contact her.

⁴Respondent requested that Schaeffer pay the filing fee for the second petition. She refused to do so and it appears that respondent paid the fee.

The Hamilton Matter (District Docket No. IV-91-09E)

In August 1990, James A. Hamilton retained respondent to represent him in a drunk-driving matter in municipal court, paying respondent \$350. Hamilton's check was cashed and, as the DEC noted, the funds were not deposited in respondent's trust account or in his business account. After the drunk-driving matter was listed for trial, respondent told Hamilton to appear in court and ask for a postponement, which was granted.⁵ When the matter was again listed for trial, respondent informed Hamilton that he would have it postponed. Respondent, in fact, did not have the matter postponed and a bench warrant issued on September 12, 1990 for Hamilton' arrest. Hamilton was forced to pay a \$250 bail. The matter was once more listed and, again, respondent did not obtain a postponement, as he represented to Hamilton. Although Hamilton was not arrested the second time, the police did appear at his home. Hamilton received whatever little information he had about his case, for example, the promised postponements, only after numerous attempts to speak with respondent. The DEC noted that respondent had failed to file an answer on Hamilton's behalf and, indeed, had taken no action to earn the fee he was paid.

Hamilton found out that respondent had been suspended by contacting the DEC. When asked about it, respondent told Hamilton that he was still able to represent him.

⁵According to Hamilton, he had a previous DWI and respondent told him that they could have the matter postponed until they passed the ten year cut-off point, at which time the court could no longer consider the previous offense (T1/21/92 61).

The Babilya Matter (District Docket No. IV-91-10E)

Michael A. Babilya received a flyer from respondent, in which he held himself out as a specialist in bankruptcy matters. In December 1989, Babilya gave respondent a deposit to represent him, along with some documents. Babilya contacted respondent, who informed him that the procedure would take time and that he should not be concerned. Subsequently, Babilya received a foreclosure notice, at which time he realized that respondent had taken no action on his behalf.

The Smith Matter (District Docket No. IV-91-15E)

Richard T. Smith, Esq. represented the defendant in a civil matter, in which respondent represented the plaintiff. On October 26, 1990, after numerous attempts to reach respondent by telephone, Smith sent him a letter, indicating that he had been unable to reach him and asking that he sign a consent order extending Smith's time to file an answer. Respondent signed the order. Thereafter, on November 1, 1990, Smith saw the notice of respondent's suspension in the New Jersey Law Journal and contacted him. Respondent told Smith that the suspension had been taken care of and that he was authorized to practice. Based upon respondent's representation that he was permitted to practice, Smith subsequently forwarded the answer in the civil matter and the consent order to the court.

The Green Matter (District Docket No. IV-91-16E)

Joy Green's daughter received several letters from a Ernest R. Costanzo, stating that he had been retained to collect \$12.80 that Green's daughter owed to Palmer Video.

The DEC determined that there was a lack of clear and convincing evidence that the letters had come from respondent and not from another individual using respondent's name. The DEC recommended that the matter be further investigated.

The Venturini Matter (District Docket No. IV-91-37E)

Albert and Ethel Venturing retained respondent to assist them in a matter involving a lien on their property. The Venturinis paid respondent \$150 and subsequently had little or no communication with him. He apparently took no action on their behalf.

The Hayes Matter (District Docket No. IV-91-43E)

In May 1990, Henry A. Hayes retained respondent to represent him in a bankruptcy proceeding. Respondent informed Hayes that his fee was \$800 and that he required an additional \$120 for filing fees. No written fee agreement was provided. Hayes paid respondent \$920 in two installments. During the initial meeting, Hayes paid respondent the first installment of \$520 (one-half of his fee plus filing fees).⁶ At that time, Hayes expressed concern about the creditors who were contacting him. Respondent advised

⁶The remaining \$400 was paid in August.

him to stop paying the bills that he was receiving and to save the money to pay his fee. Hayes' creditors continued to contact him and he received no communication from respondent. Unable to reach respondent, Hayes took several days off from work to attempt to communicate with him.⁷ On October 5, 1990, Hayes found respondent in his office. When he asked about his proceeding, respondent informed him that the process would take time. Hayes requested that, as an act of good faith, respondent provide him with a check for \$920, stating that he would hold it. Respondent provided the check. Hayes held the check for several months and then attempted to deposit it. The check was returned for insufficient funds and Hayes was forced to pay a \$25 charge. After a number of months passed, with still no communication with respondent, Hayes retained another attorney, paying him \$1000. Subsequently, Hayes learned that all respondent had done on his behalf was to obtain a docket number in the matter.

The Carelli Matter (District Docket No. IV-91-49E)

In March or April 1988, James F. Carelli retained respondent to represent him in a matrimonial matter, paying him \$1800.⁸ There was no written fee agreement provided. Respondent did appear in court on Carelli's behalf and some agreements were reached.

⁷The DEC noted its concern that Hayes, who was already in a perilous financial situation, was forced to take time off from work to attempt to speak with respondent.

⁸Although Carelli testified that he paid respondent an additional \$1500 in this matter, the record indicated that, in fact, the total payment was \$1800 (T1/21/92 50, Exhibit P-10).

However, several orders were entered against Carelli with no input from Carelli or respondent. The DEC determined that, although respondent did make occasional appearances, no answer was filed on Carelli's behalf and respondent did not reply to some of the motions filed.⁹

Carelli testified that, while he did communicate with respondent, he found it difficult to actually obtain information about his case. Carelli did eventually retain a second attorney to represent him in the divorce proceeding. In addition, a lawsuit was filed against respondent, seeking the return of the money Carelli had paid respondent. Carelli obtained a judgment against respondent which, as of the date of the DEC hearing, he had been unable to collect.

A criminal matter involving Carelli grew out of the matrimonial case and, in August 1988, respondent was paid \$1500 for representation. Respondent told Carelli not to appear in court and a bench warrant issued, resulting in Carelli's arrest. Ultimately, respondent did resolve the criminal matter on Carelli's behalf.

The DEC found respondent guilty of the charges in the complaint, with the exception of violations of RPC 7.3(b) and RPC 7.4 (the Marinelli and Babilya matters) which were not specifically enumerated in the panel report. The DEC also found respondent

⁹The DEC found it significant that Carelli still received copies of motions at home, probably because respondent never filed an answer or entered his appearance in the case.

guilty of a violation of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees that the determination of the DEC that respondent was guilty of unethical conduct was fully supported by clear and convincing evidence. The Board also agrees with the DEC's finding of a violation of RPC 8.1(b). With regard to RPC 7.3(b) and RPC 7.4, it is assumed that, because the DEC did not specifically list a violation of those rules, it did not find clear and convincing evidence of any impropriety in that regard. The Board agrees with the DEC's conclusion. Because the flyers allegedly sent to Marinelli and Babilya were not made a part of the record, the Board is unable to find, to a clear and convincing standard, that respondent violated RPC 7.3(b) and RPC 7.4.

The Board disagrees, however, with the DEC's finding in the Green matter. This same type of situation was before the Board under Docket No. 91-351, a prior matter involving this respondent. At that time, the Board determined that, given respondent's "field of expertise" and the circumstantial evidence against him, there was clear and convincing evidence that respondent was responsible for letters like those Green's daughter received, which were dated after he was suspended from the practice of law. In both matters, this charge was made known to respondent in the formal complaint

against him, which he chose not to answer. The Board now, as previously, deems those charges admitted.¹⁰

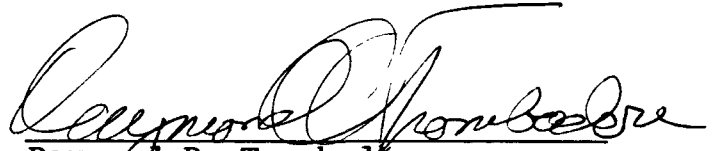
The Board has previously examined respondent's unacceptable methods of practicing law. As noted in its decision in In re Costanzo, Docket No. DRB 91-351, respondent's conduct is nothing short of appalling. He has gone so far as to defy the Supreme Court. Accordingly, the Board reiterates its previous recommendation that respondent be disbarred.

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

Dated:

4/29/77

By:


Raymond R. Trombadore
Chair
Disciplinary Review Board

¹⁰With regard to the DEC's recommendation that the Green matter be further investigated, the Board noted that the same recommendation was made when this behavior previously came before the Board. The Board again points out that, since respondent has already been charged in this matter, further investigation and presumably, a further charge would subject respondent to double jeopardy.