

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-160

IN THE MATTER OF :
J. DAVID ALCANTARA, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 20, 1994

Decided: December 15, 1994

Harold Kokes appeared on behalf of the District I Ethics Committee.

Mary Maudsley appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by the District I Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 3.4(a) (unlawfully obstructing another party's access to evidence); RPC 3.4(b) (counseling or assisting a witness to testify falsely); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 3.4(f) (requesting a person other than a client to refrain from voluntarily giving relevant information to another party); RPC 4.2 (communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter); RPC 8.4(a) (violating or attempting to violate the Rules of Professional Conduct); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's

honesty, trustworthiness or fitness as a lawyer); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1988. He has no prior ethics history.

On March 20, 1992, at the courthouse in Mays Landing, New Jersey, respondent communicated with two co-defendants in a case in which respondent represented another co-defendant, Wilfredo ("Junior") Carmona. The contents of the communication and the manner in which it arose are in dispute.

Lonnie Campbell and Johnny Nieves were witnesses in the District I Ethics Committee ("DEC") hearing. They were also co-defendants with, among others, Junior Carmona, respondent's client. The co-defendants were charged with stealing a church bell. Campbell and Nieves were represented by Bradley Weitheimer and Bernard Sypniewski, respectively. Both Campbell and Nieves had entered into a plea agreement with the prosecutor and both had agreed to testify against respondent's client. Nieves and Campbell were both at the courthouse, on March 20, 1992, for sentencing. The prosecutor in the matter, Theodore F.L. Housel, applied for an adjournment of the sentencing of Nieves and Campbell until the date the prosecutor believed Carmona's trial would be completed. The motion was granted. Afterwards, Housel left the courtroom to locate Campbell and Nieves to arrange for their interviews for the upcoming trial against the remaining defendants.

Housel located the two outside the courtroom and approached them to set up the interviews. It was at that time that Housel learned that respondent had had a conversation with the co-defendants. Housel testified at the DEC hearing that Campbell told him that he knew that Housel was trying to "f--- them." When Housel asked Campbell what that meant, Campbell replied that respondent had advised him and Nieves that Housel was only putting the sentencing off until the co-defendants testified and that, after Housel had used them as witnesses, he would "abrogate the plea agreement and stick it to them because . . . [Housel] had a case against them because they had confessed and the other individuals had not." 3T71¹.

The alleged communication between respondent and the co-defendants occurred without the knowledge or consent of either of their attorneys. Therefore, Housel arranged for Detective Sergeant Edward S. Armstrong, Jr., of the Atlantic County Prosecutor's Office, to obtain the sworn statements of Campbell and Nieves on March 25, 1992 (Exhibits P-1 and P-2, respectively) to determine the substance of the communication between respondent and the co-defendants.

More than a year later, the co-defendants testified before the DEC. For the most part, the substance of Nieves' and Campbell's statements was consistent with one another. Nieves' July 26, 1993 testimony (2T)², was consistent with his earlier statement, as

¹ 3T denotes the transcript of the DEC hearing on September 1, 1993.

² 2T denotes the transcript of the DEC hearing on July 26, 1993.

was Campbell's on July 16, 1993 (1T)³, even though the latter was difficult to understand.

The facts adduced from the co-defendants' statements (Exhibits P-1 and 2) are as follows:

On March 20, 1992, respondent approached Nieves and inquired whether he spoke Spanish. Nieves answered affirmatively but indicated he would rather speak in English. Campbell soon after joined the two. Respondent identified himself as the attorney representing Junior Carmona. He advised the co-defendants that the case was postponed so that the investigator could find enough additional evidence to reconsider the plea and "stick it in [their] a-- or really f--- [them] with the charge." Exhibits P-1 at 2 and P-2 at 2.

Respondent asked the co-defendants not to testify against his client and told them they should plead the fifth amendment. According to Nieves, respondent stated that his client could really "grow horns and be a real devil." Both co-defendants stated that respondent told them that his client could make accusations against them regarding additional crimes that they committed. Respondent told them that Carmona's cousin was taking "pictures" of the co-defendants engaging in some type of drug-related transaction. Campbell stated that respondent told him and Nieves that respondent had basically won the case, that the only ones that could get hurt would be Campbell, Nieves and a third co-defendant and that the co-defendants were being used and manipulated by the court system to

³ 1T denotes the transcript of the DEC on July 16, 1993.

incriminate Carmona.

Respondent gave both Nieves and Campbell a business card (Exhibits P-3 and P-4) and asked them to call him to make an appointment to be interviewed. Respondent concluded the conversation by telling Campbell and Nieves that, as far as he was concerned, the conversation had never taken place at all. According to Campbell, when the prosecutor left the courtroom, "everybody [went] hush, hush." Exhibit P-1 at 3. In other words, when the prosecutor came into view, the conversation ended.

At the time Campbell testified before the DEC, he was incarcerated at the Bayside Facility of the Ancora State Hospital, Hammonton, New Jersey. The facility is a corrections institution, not a psychiatric facility. Campbell was a hostile witness for the presenter, as was evident from his opening comment: "I don't plan on testifying. I can, yeah, but I don't plan on testifying." 1T5. Campbell's hostility was most likely due to the fact that, even though he had agreed to cooperate with the prosecutor's office by entering a plea and agreeing to testify, he apparently was, nevertheless, sentenced, while the charges against respondent's client were dismissed. Campbell testified that he felt respondent was a good attorney and he wished respondent had represented him. He felt that respondent's statements — that he and Nieves would be the one to suffer — were true; i.e., he felt he had been crossed.

Despite Campbell's hostility he, nevertheless, corroborated the fact that respondent had approached him in court (1T9), that respondent advised him to plead the fifth, and that he could not

plead the fifth and take the plea bargain too. 1T15. Respondent told Campbell that "testifying . . . would only hurt [them] because, [respondent's] client and his client's cousin [were] trying to bogard [them]. . ." Id. Respondent told them that his client was trying to set them up, by taking pictures of them selling drugs. 1T15-16. Campbell stated: "like I said before, the man ain't done nothing wrong. Maybe by talking to us. . . ." Campbell also stated that "at the end of the conversation . . . respondent said 'this conversation never took place.' He did say that." 1T20; Campbell stated that respondent gave him his business card and told him and Nieves to make an appointment, to get in touch with him. 1T22.

At one point, Campbell testified that, while he was giving his statement to Sergeant Armstrong on March 25, 1992, "Armstrong" stopped whenever he got ready, turned off the tape, turned off the tape and, basically told me what to say". 1T20. However, during cross-examination on this point, the following exchange took place:

- Q. I want to come back to the statement that the Prosecutor's Office took from you. You said that -- in your testimony you said that they turned the tape recorder on and off and told you what to say?
- A. Yeah, Basically, yeah.
- Q. Did they do that with each question or with only some of the questions?
- A. Only some of them. Like that one where he asked did anybody threaten me. That's the only one I can remember right now.
- Q. Now, before he started the statement, did he talk to you in advance and make any suggestions as to what you should say?

- A. No, not really.
- Q. Did he talk to you in advance at all before he turned on the tape recorder?
- A. No, not this guy here but I talked to Mr. Housel a couple of times before that.
- Q. Let's take the first time you talked to Mr. Housel. What did Mr. Housel say to you?
- A. When he came out of the courtroom when I was talking to him --
- Q. Yes?
- A. -- he asked me if he was talking to us. Then he asked me did my lawyer tell me not to talk to him, something like that there. I told him I ain't seen my lawyer.

[1T30.]

Thereafter, Sergeant Armstrong testified regarding the manner in which Campbell's statement was taken. He stated:

- Q. When you took the taped statement from Mr. Campbell, would you please explain to the Committee the procedure you used to take this taped statement from Mr. Campbell?
- A. Yes, sir. First, I interviewed him about what I was going to talk to him about. Then, as that statement was taken, tape recorded, I told him, you know, what I was going to do and I went through a list of questions and then I questioned him in regards to what was said and I had given him the oath at the end. I swore him in that the statement he had given me was the truth, the whole truth and nothing but the truth. As a County Detective, I am empowered by State statute to be able to administer an oath.
- Q. What, if any, irregularities, stopping of the tape, whatever, occurred?
- A. The tape was not turned off.
- Q. Then the originals I have here would help the Committee show that it was not turned off---

A. Yes, sir.

Q. -- if the need would arise to supply the tape?

A. Yes, sir.

Q. You can hold onto that. What, if any, threats did you make to Mr. Campbell?

A. None.

Q. What, if anything, did you tell Mr. Campbell to say?

A. I didn't tell him what to say.
[3T13-14.]

This testimony, as well as Campbell's testimony on cross-examination, does not indicate that Campbell was told what to say during his statement. Instead, it is likely that both Housel and Armstrong advised Campbell as to the topic of his testimony — his conversation with respondent — rather than the stolen bell incident.

Nieves testified that respondent had approached him (2T5) and informed him that his client was Junior Carmona. Respondent had told Nieves to plead the fifth amendment and not to testify against his client because, if Carmona and his client wanted, they could really "stick it to them." 2T6. Nieves stated that, although both Campbell and he advised respondent that they were represented by counsel (2T8 and 15), respondent, nevertheless, continued talking to them.

According to Nieves, prior to the underlying indictment, he had a good relationship with Carmona, they were "all right friends" and they had never had any arguments. (2T21) However, Nieves testified that he felt threatened when respondent told him, "if

Junior Carmona wanted to, he could really grow horns and be a devil."

Nieves stated that, at the conclusion of their conversation, respondent provided him with his business card and told him to give him a call to make an appointment so they could "go over everything that is going on." 2T8. Nieves reiterated the fact that respondent stated that "the conversation really didn't take place, it was just between us" (2T9) and that respondent spoke to him in a low tone of voice, not a regular tone. 2T17.

The testimonies of Detective Armstrong and the two attorneys for the co-defendants, Wertheimer and Sypniewski, corroborate the testimony and statements (Exhibits P-1 and 2) given by Nieves and Campbell. Wertheimer, Campbell's attorney, recalled that respondent admitted speaking to Campbell on March 20, 1992. However, respondent had claimed it was just for the purpose of introducing himself to the defendant. 3T120. Wertheimer testified that the conversation had taken place without his knowledge and consent.

As a result of the conversation between respondent and the co-defendants, Wertheimer and Housel asked the court to have respondent barred from further communications with the co-defendants. Wertheimer also testified that, prior to this incident, he had instructed respondent not to speak to any of his clients (3T129).

Bernard Sypniewski, Nieves' attorney, testified that, on March 20, 1992, he saw respondent with his client and Campbell. 3T162.

Nieves told Sypniewski that he had had a conversation with respondent and that the respondent had asked him not to testify on behalf of the State. Nieves also told Sypniewski that respondent told him that the prosecutor was "just out to stick it to him" and that Carmona could become a devil. 3T163. As a result of their conversation, Sypniewski felt that respondent's comments had made Nieves nervous because Nieves felt that "something might happen to him." 3T163.

Respondent, in turn, testified that he was aware that individuals named Campbell and Nieves were co-defendants with his client but that, as of March 20, 1992, the date of the conversation, he had never met them. 4T36.⁴ Respondent further testified that he did not know who Campbell's and Nieves' attorneys were. According to Wertheimer, however, respondent had been present in the courtroom on the day of the prosecutor's application to adjourn Campbell's sentencing and, furthermore, Campbell had stood beside Wertheimer. Respondent admitted that he had been in the courtroom on that day, albeit in connection with another matter.

Respondent's version of what transpired varies greatly from that of the co-defendants'. He claimed that, outside the courtroom, he was propped up against the wall. 4T39. Thereafter, a young hispanic male, whom he did not know, approached him and inquired "you are a lawyer?" 4T43-44. When he responded affirmatively, the man, Nieves, inquired whether he could ask

⁴ 4T denotes the transcript of the DEC hearing on October 1, 1993.

respondent a few questions. Respondent replied affirmatively. Nieves then began explaining his case and that he had been charged with stealing a bell. At that point, respondent began to think that there might be a problem because he realized Nieves was discussing the case involving his client. 4T44.

Respondent indicated that, at that point, Campbell, whom he described as a black man in a green jacket, approached respondent and Nieves, but said nothing. 4T45. Respondent then asked Nieves whether he had an attorney and Nieves replied, "yes, but I never get to see him." Respondent then gave Nieves his business card. Id. Respondent seemed to recall that both Nieves and Campbell requested his business cards. Respondent advised Nieves that his lawyer should contact him so they could "discuss the case together and work out a better case in common." 4T46. Respondent estimated that the entire conversation took fewer than sixty seconds, perhaps thirty seconds. 4T48.

Respondent testified that, thereafter, both Wertheimer and Housel approached him to question him about his conversation with the co-defendants and whether he had given Nieves and Campbell business cards. 4T50. All the attorneys then returned to the courtroom, whereupon Housel moved to have respondent barred from any conversations with the co-defendants. 4T52. Respondent claimed that he was not permitted, at that time, to explain what had transpired. 4T53.

Respondent testified that there was hostility between Nieves and Carmona. 4T55. He also testified that he had received a video

tape from his client that showed Campbell and Nieves conducting drug transactions and that he turned the tape over to the Atlantic City Prosecutor's office several days later. 4T66. Respondent gave the tape to Sergeant Armstrong and told him:

I have some real hot evidence here that you should take a look at showing these co-defendants that was provided to me by my client, Junior Carmona, and his cousin, and I think that you should really make an effort to see if this has any validity, and maybe, filing [sic] an indictment against them. You should have a copy, and give me back the original.

[4T58.]

Respondent initially claimed that he received the tape "between 14 and 20 days" after he encountered the co-defendants in March 20, 1992 (4T57) and later testified it was four weeks after the incident. 4T96. He also claimed that he believed that nothing happened as a result of the tape because neither he nor his clients, who filmed it, were subpoenaed. 4T96,59.

Finally, Housel testified that he moved to dismiss the criminal matter against Junior Carmona. Apparently, Campbell and Nieves had become involved in the sale of narcotics to undercover agents of the Prosecutor's Office Narcotics Task Force. 4T109. The office was planning to file criminal charges against them, which of course would become discoverable to respondent. The prosecutor, therefore, concluded that, with all the cases pending against Campbell and Nieves, a jury would have difficulty "dealing with the guys." 4T110. Thus, the prosecutor felt that their testimony against Carmona would not be perceived as credible by a jury. Housel concluded, "I wasn't about, on the stolen bell case, to

give away the courthouse for hand-to-hand narcotics distribution. I just bit the bullet and dismissed the 'stolen bell case' against Carmona". The Prosecutor did not file criminal charges against respondent for his alleged conversation with the witnesses.

The DEC found respondent guilty of unethical conduct for knowingly disobeying an obligation under the rules of a tribunal (RPC 3.4(c)); requesting a person, other than a client to refrain from voluntarily giving relevant information to another party (RPC 3.4(f)); communicating with co-defendants whom respondent knew or should have known were represented by other attorneys (RPC 4.2); violating the rules of professional conduct (RPC 8.4(a)); and engaging in conduct prejudicial to the administration of justice (RPC 8.4(d)).

CONCLUSION AND RECOMMENDATION

This case centers in part on the credibility of the witnesses and whether Nieves' and Campbell's testimony is believable. Notwithstanding that both witnesses were incarcerated at the time that they testified before the DEC and that they had been involved with the law apparently before and after the stolen bell incident, there is sufficient evidence in the record to find that the witnesses indeed had a conversation with respondent. The Board, however, disagrees with the DEC findings as to the substance and relevance of the conversation.

The Board unanimously recommends the dismissal of the charges

against respondent, finding that the testimony of Campbell and Nieves was not credible.

Even assuming arguendo, that the witnesses' testimony was credible, the charges must still be dismissed. RPC 4.2 states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so." The Board concluded that the word "party" is a term of art, which specifically denotes "adversaries" — people with opposing interests. In the "stolen bell matter," Campbell and Nieves were no longer parties or co-defendants in the matter; they were only witnesses. As witnesses, they had the right to talk to respondent without their attorneys' being present, if they so desired.

RPC 3.4(f) states that a lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information unless the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. The Board determined that respondent's advice to the witnesses not to testify would have benefitted the witnesses' interests, rather than adversely affect them. As with Carmona, without the witnesses' plea agreement and with no other evidence available to the prosecutor, the prosecutor would have had to dismiss the charges against Campbell and Nieves.

Based on the foregoing, the Board determined that there was no violation of RPC 8.4(d).

The Board also found no clear and convincing evidence in the record to sustain a finding of RPC 3.4(c). The Board, therefore, unanimously recommends the dismissal of the charges against respondent. Three members did not participate.

Dated: 12/15/94

By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board