SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-105

IN THE MATTER OF

SHIRLEY WATERS-CATO

AN ATTORNEY AT LAW

Decision
of the
Disciplinary Review Board

Argued: May 17, 1995

Decided: July 7, 1995

Peter S. Valentine appeared on behalf of the District VB Ethics Committee.

Respondent waived appearance.

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

This matter was before the Board based on a recommendation for discipline filed by the District VB Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.15(a) (failure to safeguard property) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities). The complaint was subsequently amended to allege violations of RPC 4.1(a)(1) and (2) (making a false statement of material fact to a third person and failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client) and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1977. On October 29, 1991, respondent was privately reprimanded for her conduct in three real estate matters.

On April 4, 1995, respondent was suspended for a period of three months for her failure to comply with recordkeeping requirements and for failure to cooperate with the investigation of the Office of Attorney Ethics ("OAE"). The Court further required respondent, prior to readmission, to submit proof of psychiatric fitness to practice law. Finally, the Court required that, upon reinstatement, respondent practice only under the supervision of a proctor for a period of two years. Respondent remains suspended to date.

* * *

Shortly before July 18, 1988, respondent was retained by Walter Johnson and Jim Brown to represent them and their corporate entity, Blackwood Development (hereinafter "buyers"), in the purchase of a hotel owned by Patricia Wills (hereinafter "seller"). Respondent testified that, because Brown was a real estate broker, she was retained only to handle the closing. In fact, when Johnson and Brown retained her, they had already executed a contract to purchase the hotel. Paragraph 16 of that contract provided, in relevant part:

> Simultaneous with the execution hereof, Buyer has delivered to Seller a deposit check in the

> amount of $50,000.00, which shall be deposited in an interest-bearing attorneys [sic] trust account of Dillon, Bitar & Luther pending the closing. The interest shall be paid to the Seller.
>
> [Exhibit C-3]

Contrary to that particular provision, buyers had not simultaneously delivered to seller or her attorney the deposit check. Rather, upon retaining respondent, buyers advised her that they would bring her the deposit check within a few days. Therefore, respondent testified, she dictated a letter to seller's attorney, Myles C. Morrison, which read, in relevant part:

> Additionally, this is to advise that I am in receipt of the sum of $50,000.00 to be held in escrow by the attorney for the buyer, at the specific request of my client, with all interest accruing thereon to be paid to the seller at closing of this matter.
>
> [Exhibit C-4]

Although it is not clear exactly when respondent dictated that letter, respondent admitted that, at that time, she had not yet received the deposit check. It was her claimed intention, nevertheless, to forward the letter only upon receipt of the check.

On or about July 18, 1988, the buyers did, indeed, bring the deposit check to respondent's office. However, respondent was not in her office. The check was left with her secretary, who placed it in the client file. On that same date, respondent's secretary brought the previously dictated letter to her to sign while in court, in order to send it to Morrison as soon as possible. Respondent testified that she was anxious that Morrison know that she had finally received the check. It is not clear why she did not simply telephone him.

Respondent never saw the deposit check. She intended, however, to put the deposit proceeds into a certificate of deposit as soon as she obtained the necessary social security numbers. However, on July 19, 1988, the day after buyers delivered the check to her office, they again visited her office while she was not in and retrieved the check from the client file. They were apparently given access to the file by one of respondent's secretaries. When respondent learned from her secretary of that removal, she telephoned the buyers to ascertain whether there was a problem. According to respondent, without offering an explanation for the removal of the check from her office, the buyers assured her that they would return it to her.

Despite respondent's previously articulated desire to promptly notify Morrison of her receipt of the deposit check, she did not immediately notify him of its removal for a period of at least several weeks. Instead, she continued to telephone her clients, hoping that they would return the check to her. Respondent testified that, when she finally notified Morrison that she no longer had the deposit check, she did so by telephone and never in writing.

At some point prior to the first scheduled closing date, it became apparent that respondent's clients would be unable to close due to their failure to obtain a mortgage. Although the contract was never contingent upon financing, respondent and Morrison (or his associate, Mary Powers) engaged in several telephone conversations, between July 1988 and September 20, 1988,

rescheduling closing dates and formulating novations to the original contract. Respondent testified that, during these conversations, she advised Morrison of her continuing efforts to obtain a replacement deposit check from her clients. She admitted that she never advised Mary Powers of the deposit check removal, even orally. Furthermore, respondent never confirmed in writing the alleged removal of the check or of her subsequent efforts to recover it.

Confirming letters were forwarded to respondent on both August 18, 1988 and August 26, 1988, following rescheduling of the closing date. Exhibits C-5 and C-6. Neither letter disclosed any awareness on Morrison's or Power's part that respondent no longer held the required deposit. To the contrary, the last paragraph of both letters reads:

> If your client should fail to close . . . as required, we hereby demand that you forward the deposit monies to me immediately to be paid to Ms. Wills as a result of your client's breach.
>
> [Exhibits C-5 and C-6]

In or about September 1988, closing of title apparently became improbable. On September 20, 1988, respondent wrote to Morrison advising that, by copy of her letter, she was "releasing the escrow funds . . . to Blackwood Development Corporation." The letter purports to carbon copy Walter Johnson "with encls...." Exhibit C-7. Respondent testified that she wrote this letter out of frustration from her inability to persuade her clients to replace the deposit check. She, therefore, advised Brown that she would no longer deal with the situation in his behalf and that she would

leave him to handle matters. She characterized her admitted misrepresentation in this letter as a poor choice of words. See Exhibit C-9, respondent's July 5, 1991 certification to the DEC investigator.

At some point following buyers' failure to close on the property, Morrison filed a civil suit in behalf of the seller. Respondent was named as a defendant in that suit for her "improper release" of the escrow funds. Morrison testified that it was not until after he filed the lawsuit that he learned from respondent, for the first time, that the deposit check had been taken by her clients long before her letter of September 20, 1988.

Respondent did not file an answer to the civil complaint. Therefore, judgment by default was entered against her for $50,000 (the amount of the deposit) plus interest. Morrison subpoenaed respondent to testify at the proof hearing. Respondent testified in that matter that she had not filed an answer to the complaint because she believed the civil action would settle prior to reaching trial. Specifically, she continued to believe that her clients would pay the buyer the $50,000.00 deposit amount, which was all that was required to release her as a party-defendant.

After judgment was entered against respondent, seller retained the services of J.J. Longley to collect on the judgment. Longley testified that, on or about June 19, 1992, he obtained an order for discovery requiring respondent to either appear for an "assets deposition" or to answer interrogatories. Exhibit C-7. He testified that respondent did neither. Therefore, on or about July

27, 1992, a Superior Court judge signed an order to show cause ("OSC") why respondent should not be adjudged to have violated litigant's rights. The OSC was returnable on September 11, 1992. When respondent failed to appear on that date, the judge issued a warrant for her arrest.

Respondent testified that she had complied with the order for discovery by answering interrogatories and by supplying certain documents, such as mortgages and tax returns. (Langley admitted that Morrison's firm had already conducted an "assets deposition." However, he was unable to locate any tax returns). In addition, respondent testified that she had never received the OSC because the person in her office who signed the return of service apparently never gave her the order. Furthermore, respondent testified that, during the week prior to and including the return date of the OSC, she was in Georgia for a church convention. She first learned of the OSC from her husband, who telephoned her to advise that her office had called with news of the arrest warrant. When respondent returned from Georgia, she apparently telephoned the court and made arrangements to appear on September 16, 1992. On that date, the judge vacated the arrest warrant, ordered her to pay counsel fees in the amount of $1,000 and further ordered her to provide answers to interrogatories by October 23, 1991. (Respondent did not recall whether she advised the judge that she had already complied with discovery).

Langley testified that, while respondent had, indeed, paid the ordered counsel fee, she only partially answered interrogatories.

He, therefore, filed another petition for the issuance of another OSC, which was returnable on December 4, 1992. Respondent did not appear on that date. The judge again issued a warrant for respondent's arrest. That warrant was never served because respondent again contacted the court the following day to make arrangements to appear on December 9, 1992. Respondent testified that she had, indeed, been served with that particular OSC at her home. However, she testified, she simply could not "deal with it" and did not even read it. 3T42.[1] On that date, the court again vacated the arrest warrant, ordered respondent to pay counsel fees in the amount of $2,000 and required her to answer the balance of the interrogatories.

While the record grows somewhat murky at this point, it appears that respondent attempted to resolve certain outstanding discovery issues with Langley. However, she testified, partly due to what she perceived as Langley's abusive behavior towards her and partly due to her father's long illness and subsequent death, she began to experience some unidentified emotional problems. She testified that, despite exhaustive efforts on her part, she simply did not have the funds to pay the judgment in full and nothing less would satisfy Langley. It appears, therefore, that, when the court entered another order enforcing litigant's rights on April 16, 1993 (Exhibit C-3), respondent's husband, also an attorney, stepped in to represent her.

---

[1] "3T" refers to the DEC hearing transcript of November 3, 1994.

Ultimately, respondent and her husband were able to obtain mortgages to satisfy the original judgment and interest. Langley testified that respondent has paid a total of over $70,000 in this matter.

Finally, the original ethics complaint alleged that respondent had failed to cooperate with the disciplinary authorities. While respondent had, at some point, filed a response to the grievance, it appears that she either did not file an answer to the original complaint or had done so on the day of hearing. (The answer is not part of the record). In addition, respondent did not file an answer to the amended complaint until the last date of hearing in this matter. While respondent contended that she believed that her attorney would file an answer in her behalf, she admitted that she never contacted her attorney to discuss that issue, even after the DEC chair notified her that no answer had been filed.

Respondent testified that she was beset by both financial and emotional problems due to a host of factors. She has consulted a professional for these problems in the past, although it does not appear that she is currently under treatment. As in past ethics matters, respondent testified that she becomes "paralyzed" when faced with ethics problems and inquiries.

* * *

The DEC found respondent guilty of a violation of RPC 1.1(a) for her failure to report to Morrison, on a timely basis, that she

no longer had the deposit check, for her failure to deposit the $50,000 check into her trust account while she did have it and for allowing her client to remove the check from the file. In addition, the DEC found respondent guilty of a pattern of neglect for her actions in this matter when combined with those comprising the subject of a prior private reprimand and for her conduct vis-à-vis the various court orders. The DEC further found respondent guilty of violations of RPC 4.1(a) for her failure to timely disclose the removal of the check by her client and for her misrepresentation, in her September 20, 1988 letter, that she was returning the escrow funds to her client when she, in fact, did not have them at that point. The DEC also found respondent guilty of a violation of RPC 1.15 for her failure to properly safeguard the deposit funds. The DEC further found respondent guilty of a violation of RPC 8.4(d) for her conduct vis-à-vis both the civil suit and the incident supplementary proceedings. Finally, the DEC determined that respondent was guilty of a violation of RPC 8.1(b) for her failure to file a timely answer to the original and the amended complaint.

The DEC was obviously exasperated by respondent's conduct as well as her attitude towards the DEC, which it described as arrogant and contumacious. The DEC noted that respondent told semi-truths and feigned memory. Because the DEC concluded that respondent had demonstrated an inability to practice law and to deal with problems, it recommended that respondent be suspended

indefinitely or until her condition can be certified to have been corrected.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is supported by clear and convincing evidence. Respondent's conduct in failing to disclose to Morrison, in a timely fashion, that her client had removed the deposit check from her file in her absence and in misrepresenting to Morrison that she was "returning" the escrow funds to the buyers was a violation of RPC 4.1(a)(1) and (2). Respondent's assertion that she orally advised Morrison of her client's removal of the check is incredible both in light of Morrison's testimony to the contrary as well as her subsequent misrepresentation in her letter of September 20, 1988. Respondent's conduct in this regard also violated RPC 8.4(c), although the complaint does not charge her with a violation of that rule. In addition, her conduct in failing to timely advise Morrison of her client's misdeed constituted gross neglect, in violation of RPC 1.1(a).

Respondent's conduct both in failing to file an answer to the civil complaint as well as her conduct in the supplementary proceedings, including her disobedience of court orders, constituted, at a minimum, gross neglect, in violation of RPC 1.1(a). Furthermore, respondent's neglectful conduct during the course of the civil action and, particularly, the supplementary

proceedings, necessitated the expenditure of considerable court resources to compel respondent to do what she was ethically and legally obligated to do from the beginning, in violation of RPC 8.4(d). While it is true that respondent ultimately harmed herself by her disregard of the civil action and the supplementary proceedings (she obviously had a valid defense to the plaintiff's claim and certainly a valid cross-claim against her clients), such a cavalier disregard of legal and ethical obligations cannot be countenanced.

Respondent's conduct vis-à-vis the DEC was similarly inexcusable. Respondent was no stranger to the ethics system. She has twice before been the subject of inquiry. By now, her obligations should be abundantly clear. As in at least one previous ethics matter, respondent simply refused to confront her responsibilities. While respondent has alleged that she suffered from some ambiguous disability, she has offered nothing into evidence to support her defense. The Court confirmed the DRB's rejection of essentially the same claim offered by respondent in the audit matter only months ago. She has advanced no additional factors that would merit different treatment. Her conduct in failing to file timely answers clearly violated RPC 8.1(b).

Finally, respondent's conduct, when combined with her conduct in prior matters, constituted a pattern of neglect, in violation of RPC 1.1(b).

The Board cannot agree, however, with the DEC's conclusions that respondent's failure to deposit the check into her trust account and/or to allow her client to remove the check from the file constituted violations of RPC 1.1(a) and RPC 1.15. There simply was no evidence to support these findings in light of the uncontroverted fact that the check was removed in respondent's absence only one day after it was delivered to her office. While the actions by respondent's staff, in placing the check in the client file and allowing the clients access to the file and removal of the check, do raise some questions regarding respondent's office practices and supervision of staff, the record is insufficient for a separate finding of unethical conduct on that basis.

In the past, similar misconduct has resulted in a term of suspension. For example, in In re Jenkins, 117 N.J. 679 (1989), the Court suspended an attorney for one year for gross neglect in two matters, misrepresentation to his clients and disregard of the disciplinary process.

While respondent's conduct in this matter was limited to one particular case, there are substantial aggravating factors. Specifically, respondent's conduct included two instances of misrepresentation. Not only did respondent fail to disclose to Morrison that her clients had removed the escrow check from her file, but she also affirmatively misrepresented to him, months later, that she "was returning" the deposit to her clients. Moreover, respondent's conduct in this matter included conduct that was prejudicial to the administration of justice, a violation not

present in Jenkins. Finally, respondent has twice before been the subject of discipline. While the conduct in the private reprimand matter overlapped in time, the same cannot be said of respondent's conduct in the audit matter, for which she has received a three-month suspension. In addition, as in that prior audit matter, respondent, once again, has failed to fully cooperate with the disciplinary authorities. The only possible inference is that respondent has not acquired any appreciation for her responsibilities as an attorney.

Under a totality of the circumstances, an eight-member majority of the Board has determined that a one-year suspension, retroactive to April 4, 1995, (the date of the imposition of her three-month suspension), is the appropriate discipline for respondent's misconduct consisting of gross neglect, pattern of neglect, misrepresentation, disregard of court orders and failure to cooperate with the disciplinary authorities. The Board has further determined that, during the course of her suspension, respondent should be evaluated by a psychiatrist selected by the OAE for the purpose of determining whether therapy is warranted. In that event, respondent is to undergo such therapy. In addition, prior to reinstatement, respondent must provide psychiatric proof that she is fit to practice law. Finally, upon reinstatement, respondent shall practice under the supervision of a proctor for a period of two years.

One member would have imposed a two-year suspension. That member was of the view that the record did not justify a need for psychiatric evaluation.

The Board further directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/7/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board