SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-350

IN THE MATTER OF

THOMAS MILITANO

AN ATTORNEY AT LAW

Decision

Argued: November 21, 2002

Decided: March 26, 2003

James M. DeMarzo appeared on behalf of the District X 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 was before us on a recommendation for discipline filed by the District X Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1991. On February 6, 2001 he received a reprimand for failure to advise a client that the assistance requested of him was not permitted by the Rules of Professional Conduct or other law, misrepresentation and failure to cooperate with disciplinary authorities. In re Militano, 166 N.J. 367 (2001).

This matter was originally before us as a default (Docket No. DRB 00-335) in November 2001. At the eleventh hour, respondent retained an attorney to file a motion to vacate the default. After considering compelling evidence of respondent's bipolar psychiatric condition, we determined to remand the matter for hearing. The matter is now before us after the hearing on remand.

* * *

The complaint alleged that respondent mishandled a municipal court criminal matter, in violation of RPC 1.1(a) (gross neglect), RPC 1.2 (failure to abide by the client's decision regarding the matter) and RPC 1.3 (lack of diligence); failed to maintain a bona fide office, in violation of RPC 5.5(a); and failed to cooperate with ethics authorities, in violation of RPC 8.1(b).

According to the complaint, in June 1998 Sharon Cornell retained respondent to represent her in the appeal of a municipal court conviction for possession of marijuana. The court also revoked her driving privileges for six months and imposed a $1,082 fine.

The DEC' efforts to locate Cornell to testify in this matter were unsuccessful. Indeed, her immediate family, including a sister and daughter, did not know her whereabouts. She had apparently moved to the state of Washington, without leaving a forwarding address. As a result, the grievance and ethics complaint are the only sources of information about Cornell's version of the events.

According to the complaint, Cornell paid respondent $300 to file an appeal of her criminal conviction. Respondent did not file the appeal, however. In November 1998 Cornell

learned that her license had been suspended, when she was stopped for another motor vehicle offense. As a result, she received a summons for driving while on the revoked list. When Cornell contacted respondent, he told her that he would try to file a late notice of appeal of the original conviction. Nevertheless, respondent took no further action in Cornell's behalf.

Respondent, in turn, denied that Cornell had retained him to file an appeal of the conviction.[1] According to respondent, some months prior to June 23, 1998, Cornell, a longtime family friend, asked him to represent her in connection with criminal charges then pending against her in municipal court for the possession of marijuana. Respondent represented her at the June 23, 1998 trial, although she had not paid his retainer prior to the trial.[2]

According to respondent, immediately following Cornell's conviction, she asked him to appeal it. He agreed to do so only if she first paid him as follows: 1) for services already performed in the municipal trial; 2) for the $300 cost of the municipal court transcript, which he needed for the appeal; and 3) for an additional $500 retainer to initiate an appeal. In fact, respondent stated, after the time to file the appeal had expired, Cornell paid him $300 in cash, which he later returned to her. Respondent contended that he never advised Cornell that he would attempt to file an appeal out of time. Indeed, respondent recalled a conversation that he had at the time with a Sussex County assistant prosecutor, in which respondent related

[1] Respondent did not testify at the DEC hearing, for reasons detailed below. Therefore, we relied on respondent's verified answer for his version of the events.

[2] There is an apparent typographical error between pages one and two of respondent's verified answer, at the point where a reader would expect to see the retainer amount displayed. Therefore, we do not know the retainer amount.

the unlikelihood that he would file a late motion in Cornell's behalf because she had failed to pay the sums required prior to his retention.

Respondent attended the DEC hearing with counsel. He elected not to testify about the underlying facts in the Cornell matter, after the presenter withdrew the allegations of violations of RPC 1.1(a), RPC 1.2 and RPC 1.3. The presenter conceded that, because he was unable to produce Cornell for testimony, he could not prove those allegations by clear and convincing evidence.

Respondent's answer admitted the remaining violations of RPC 5.5(a) and RPC 8.1(b). With regard to his failure to maintain a bona fide office, respondent stated that, in February 2000, while in the depths of a depression, he closed down his law office, gave up his apartment in the same building and moved into his parents' house. Presumably, respondent continued to practice law, since he admitted that he did not have a bona fide office. With regard to RPC 8.1(b), respondent admitted receiving the original grievance in this matter sometime in 1999, but denied receiving any further correspondence sent to him at his old office location. At the DEC hearing, respondent's attorney reiterated respondent's admission that he had failed to cooperate with the DEC in the investigation of the matter, in violation of RPC 8.1(b).

In mitigation, respondent offered evidence of significant mental illness. Respondent's psychiatrist, Ravi Baliga, M.D., wrote several letters to ethics authorities, including one to us, when this matter was in a default posture, dated November 5, 2001. That letter stated as follows:

[Respondent] is under my care for the treatment of Bipolar Disorder since October of 2000. He has a history of depression and mood swings needing hospitalization in March of 1999. After his discharge from St. Clare's Hospital, he was treated by various physicians with limited improvement. He has treatment resistant Bipolar Disorder needing [a] combination of two antidepressants and a mood stabilizer. He is at risk for decompensation while under stress even when he takes the medication regularly.

Furthermore, in his certification in support of his motion to vacate default, respondent explained as follows:

During the year 1997 I began to find it difficult to function in my personal life and as an attorney. While not at that time being aware of what was causing this, in retrospect I now realize I was suffering from depression. I eventually consulted with my general medical practitioner, [] who told me he thought I was suffering from a bi-polar condition and he prescribed daily doses of 1000 milligrams of Depakote and 60 milligrams of Prozac. I did not get better. My wife could not tolerate my condition and left me taking the children with her in October of 1999.

In March of 1999 I was hospitalized for 14 days at St. Clare's Hospital in Denville, New Jersey. When my condition did not improve, I decided to give up the practice of law in the winter of 1999 and 2000 as my depression became deeper. This was in part occasioned by the fact that I had a then pending disciplinary matter which resulted in a sanction of a reprimand. In July of 1999 I received the grievance in this case but never responded to it. All of this did at least result in my recognition that I should not be practicing.

Dr. Baliga reassessed respondent's condition in his most recent post-remand submission to the DEC, dated May 22, 2002:

It continues to be my opinion within a reasonable degree of psychiatric certainty that [respondent] during that period of time was suffering from treatment resistant Bi-polar disorder causing decompensation while under stress even when he took the medications he was then prescribed.

* * *

In my [prior letters], I expressed my opinion that the prognosis for [respondent's] return to practice in the near future was 'good.' I can now express an opinion within a reasonable degree of psychiatric certainty that [respondent] is presently able to return to full-time practice of law.

* * *

As previously noted, the presenter withdrew the allegations of violations of RPC 1.1(a), RPC 1.2 and RPC 1.3. It found that respondent failed to maintain a bona fide office, in violation of RPC 5.5 (a), and failed to cooperate with ethics authorities, in violation of RPC 8.1(b). The DEC recommended a reprimand.

* * *

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence.

The DEC correctly dismissed the violations of RPC 1.1(a), RPC 1.2 and RPC 1.3. Without Cornell's testimony, there is no clear and convincing evidence of violations of those rules. On the other hand, we found ample evidence to support the charges of violation of RPC 5.5 (a) and RPC 8.1(b), as admitted by respondent.

With regard to RPC 5.5 (a), respondent admitted that he closed his law office in February 2000 because he was depressed. He took no precautions to ensure that clients, courts, ethics authorities or other parties that needed to contact respondent could reach him. With regard to RPC 8.1(b), respondent admitted that he received the within grievance in 1999 and did not cooperate with the DEC's investigation. By his own admission, he allowed the matter to proceed on a default basis, ultimately retaining an attorney to file a motion to vacate the default in his behalf. We found, therefore, violations of both RPC 5.5(a) and RPC 8.1(b).

Cases involving failure to maintain a bona fide office ordinarily result in the

imposition of a reprimand. In re Servin, 164 N.J. 366 (2000) (reprimand for attorney who, from 1993 through mid-1997, failed to maintain a bona fide law office; prior private reprimand for commingling personal and client funds and for recordkeeping violations); and In re Kasson, 141 N.J. 83 (1994) (reprimand for failure to maintain a bona fide law office after a trial judge was unable to reach attorney at his office to discuss a pending matter; no attorney or responsible person was available at the attorney's office location or by telephone during normal business hours.) But see In the Matter of Basil D. Beck, III, DRB 95-160 (February 1996) (admonition imposed for failure to maintain a bona fide office; in mitigation, it was considered that the attorney took swift measures to remedy the deficiency) and In re Guyer Young, 144 N.J. 165 (1996) (admonition imposed for failure to maintain a bona fide office while representing an estate; attorney's representation in New Jersey was confined to one matter.) Like Beck and Guyer Young, there is mitigation to consider here (respondent's mental condition). On the other hand, respondent's prior reprimand in 2001 is an aggravating factor.

Based on the foregoing, the Board unanimously determined to impose a reprimand. One member recused himself. Two members did not participate.

We also required respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas Militano
Docket No. DRB 02-350

Argued: November 21, 2002

Decided: March 26, 2003

Disposition: Reprimand

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson			X				
Maudsley							X
Boylan			X				
Brody			X				
Lolla			X				
O'Shaughnessy							X
Pashman			X				
Schwartz			X				
Wissinger						X	
Total:			6			1	2

Robyn M. Hill 3/27/03
Robyn M. Hill
Chief Counsel