

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-037

IN THE MATTER OF :
:
THOMAS F. MILITANO :
:
AN ATTORNEY AT LAW :
:

Decision
Default [R. 1:20-4(f)]

Decided: September 18, 2000

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

Pursuant to R. 1:20-4(f), the District X Ethics Committee ("DEC") certified the
record in this matter directly to us for the imposition of discipline, following
respondent's failure to file an answer to the formal ethics complaint.

On September 29, 1999 the DEC sent a complaint by regular and certified mail to respondent's last known address: 22 Church Street, Newton, New Jersey 07860. The certified mail was returned stamped "unclaimed." The complaint sent by regular mail was not returned. On December 22, 1999 the DEC sent a second letter to respondent by regular and certified mail, advising him that the failure to file an answer would constitute an admission of the allegations contained in the complaint and could result in his temporary suspension. Respondent was further notified that the letter served as an amendment to the complaint to add a charge of a violation of *RPC 8.1(b)* for failure to answer the complaint. Neither the certified mail return receipt nor the letter sent by regular mail was returned.

On January 6, 2000 respondent left a voice-mail message with the DEC secretary stating that he was not aware that his failure to answer could result in an additional charge, that he was under the impression that his failure to answer would merely constitute an admission of the allegations and that he would "fax" an answer to the complaint that same day. The next day, the DEC secretary tried to contact respondent, whose phone was not answered.

Respondent did not file an answer to the complaint. On January 27, 2000 the record was certified directly to us for the imposition of discipline, pursuant to *R. 1:20-4(f)(1)*.

Respondent was admitted to the New Jersey bar in 1991. He has no disciplinary history.

The complaint charged that, in October 1998, a former client, James Williams, contacted respondent in connection with motor vehicle offenses pending in the Sparta Township Municipal Court. After Williams had received the summonses, his mother, Arnetta Williams, gave him \$50 with which to apply for a municipal public defender. Williams, however, had used the funds for other purposes and requested respondent's help to convince his mother that he had used the money to apply for a public defender. Respondent either prepared a phony letter purporting to be from the Sparta Township Municipal Court, confirming Williams' application for a public defender, or gave Williams the necessary information for the preparation of such a letter. In either event, respondent participated in the preparation of the phony letter to mislead Williams' mother that Williams had used the money for the purpose intended.

Williams, accompanied by his mother, attended a hearing in Sparta Township Municipal Court, at which time the judge questioned respondent about the status of his public defender application. Mrs. Williams presented the phony letter, informing the court that her son had applied for a public defender and had paid the necessary fee. Upon reviewing the letter, the court administrator declared it a fraud. The matter

was referred to the Sussex County Prosecutor, who found no criminal conduct by respondent and, in turn, referred the matter to the Office of Attorney Ethics.

In his April 16, 1999 reply to the grievance, respondent acknowledged that "my conduct in this matter was inappropriate, wrongful and without a doubt the dumbest thing I have done in my legal career." Respondent denied any intent to deceive Arnetta Williams. He claimed that he wanted to conceal from Mrs. Williams the fact that her son was involved in another municipal court matter:

It is my memory that James E. Williams had a different Municipal Court matter (I cannot remember where) that he was dealing with, and he was trying to conceal the existence of this matter from his mother. The idea was, James would tell his mother he was in Sparta Municipal Court and would show her this letter, which he would say was hand-delivered. That would explain his whereabouts the night before to a mother whom had placed him under some relatively strict house rules (James was 19 years old at the time). He did not wish to tell her he had been in 'X' Municipal Court because she was unaware of this matter, but since she knew about Sparta it would not cause her the same upset. If my motive were as is described in the grievance, it is highly likely that I would given [sic] him \$50.00 rather than go through all of this trouble.

In mitigation, respondent contended that, at the time of the deception, he was trying a criminal matter in Passaic County, for which he was not being paid. He claimed that the court denied his motion to be relieved as counsel, despite being aware that he would not be paid. Respondent stated that, as a sole practitioner with no clerical staff, "I would spend the days I was not in trial trying to stem the flood

gates that had opened while I was out of the office." He also asserted that in October 1998 he suffered from bipolar disorder, diagnosed in December 1998, for which he continues to receive medication. Respondent apologized for his conduct and expressed confidence that his behavior would not be repeated.

The complaint charged respondent with violations of *RPC* 1.2(e) (failure to advise client that expected assistance is not permitted by the *RPCs*), *RPC* 3.3(a)(5) ((failure to disclose to a tribunal a material fact with knowledge that the tribunal may be misled) and *RPC* 4.1 (truthfulness in statements to others).

* * *

Service of process was properly made in this matter. Following a review of the record, we find that the facts recited support a finding of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. *R.* 1:20-4(f)(1). Although the record is not clear about respondent's specific actions, it is clear that, in some manner, respondent assisted Williams in deceiving Arnetta Williams. The Sussex County Prosecutor's Office concluded that respondent either prepared the phony letter or gave Williams sufficient information so that Williams could prepare the document. The letter was prepared to convince Arnetta

Williams that her son had used the \$50 to apply for a public defender, the purpose for which she had given him those funds. Respondent denied any motive to deceive Arnetta Williams about the use of the funds and admitted that his intent was to conceal from Mrs. Williams her son's involvement in another municipal court matter.

With respect to the charged *RPCs*, we find that *RPC 3.3(a)(5)* is not applicable because there is no evidence that respondent intended that the letter be submitted to the court. We, therefore, dismissed that charge. Similarly, *RPC 4.1* is not applicable because it provides that, in representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person. Although respondent was assisting his former client, he was not necessarily representing him. That charge, too, we dismissed. A more appropriate charge is *RPC 8.4(c)* (conduct involving dishonesty, fraud, deceit or misrepresentation). Although respondent was not specifically charged with a violation of *RPC 8.4(c)*, the facts in the complaint gave him sufficient notice of the alleged improper conduct and of the potential violation of that *RPC*. See *In re Logan*, 70 N.J. 222, 232 (1976).

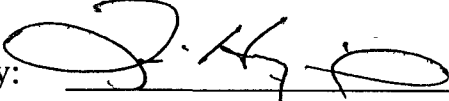
Moreover, respondent's failure to advise Williams that he would not assist him in his attempt to deceive his mother constituted a violation of *RPC 1.2(e)* and his failure to answer the ethics complaint violated *RPC 8.1(b)*.

Attorneys who have committed similar misconduct have received reprimands. In *In re Sunberg*, 156 N.J. 396 (1998), the attorney received a reprimand after he failed to consult with a client before permitting two matters to be dismissed, created a phony arbitration award and lied to the Office of Attorney Ethics, in violation of *RPC 1.2(a)*, *RPC 8.1(a)* and *RPC 8.4(c)*. His purpose for creating the false arbitration award was to mislead his partner into believing that a matter had been arbitrated. In *In re Lewis*, 138 N.J. 33 (1994), the attorney induced a repairman to change the date on a work order to mislead the municipal court into believing that the attorney had corrected a code violation before the summons had issued. Because the court was not actually deceived and because no harm resulted from the attorney's misconduct, only a reprimand was imposed.

Although ordinarily a reprimand would be the appropriate discipline for respondent's misconduct, his failure to answer the complaint constitutes an aggravating factor, requiring enhanced discipline. We have, therefore, by a five-member majority determined to impose a three-month suspension. Three members voted for a six-month suspension, finding that, ordinarily, respondent's violations would warrant a three-month suspension and that the default nature of this proceeding should elevate the term of the suspension to six months. One member did not participate.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 9/18/00

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

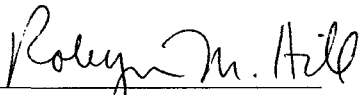
**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Thomas F. Militano
Docket No. DRB 00-037**

Decided: September 18, 2000

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Six-month Suspension	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			X				
Peterson			X				
Boylan							X
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy		X					
Schwartz		X					
Wissinger			X				
Total:		5	3				1

 10/11/00
Robyn M. Hill
Chief Counsel