SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-183

IN THE MATTER OF :
:
HARRY J. KANE, JR. :
:
AN ATTORNEY AT LAW :

Decision

Argued: September 11, 2003

Decided: October 31, 2003

Jane L. McDonald appeared on behalf of the District IV Ethics Committee.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The two-count complaint charged respondent with a violation of RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) in count one, and RPC 1.1(b) (pattern of neglect, [mistakenly cited as RPC 8.1(b)]) in count two.

Respondent was admitted to the New Jersey bar in 1989. In 2002, he was reprimanded for failure to consult with his client, failure to communicate with his client, failure to provide a written retainer agreement, failure to promptly notify his client of the receipt of settlement funds, misrepresentation, and violation of the Rules of Professional Conduct. In re Kane, 170 N.J. 625 (2002). He has been ineligible to practice law since September 2000, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

Count One

In 1997, respondent was employed as an associate at the law firm of Margolis Edelstein, under the supervision of Joseph Goldberg, Esq. Respondent was responsible for handling between fifty and seventy matters, including Anderson v. Werner Bus ("Anderson"). Respondent's misconduct in Anderson came to light in January 2000.[1] After Goldberg reviewed the file and spoke with opposing counsel, he understood that arbitration had taken place, the result had not been favorable to their client, and an appeal had been filed. His review of the case file revealed no documentation of those events. Goldberg confronted respondent with the information, whereupon the latter stated that opposing counsel was mistaken about the proceedings. Goldberg told respondent to contact the court clerk. In the interim, Goldberg learned from his office computer records that respondent had, in fact, filed an appeal of the arbitration. Later that day, respondent advised Goldberg that he had lied about the events in Anderson, and offered his

[1]In-house counsel for the insurance company in Anderson called Goldberg and advised him that respondent had asked the company to increase their reserve on Anderson from $500,000 to $1,000,000. The information caused Goldberg to review the Anderson file.

resignation from Margolis Edelstein. It came to light that respondent did not advise Goldberg, the insurance carrier or the client that the matter had not been properly prepared for arbitration and had proceeded to arbitration, resulting in an award of $1,500,000 in favor of the plaintiff. Respondent also did not advise that he had filed the above-mentioned appeal of the arbitration determination.

Prior to respondent's departure from Margolis Edelstein, he dictated memos on the status of his cases. In addition, he met with Goldberg to review his files. There is dispute in the record about the particulars of that meeting. Goldberg testified that they spent "a couple of hours" going through a list of files respondent had prepared. Goldberg recalled asking respondent if there were any other "problems" of which he should be aware. Respondent stated that there were none.

Respondent testified, to the contrary, that the meeting was less than forty-five minutes long, and that he had gone through his files as best he could in limited time. He added that he did not intend to mislead anyone about the status of the cases.

Goldberg subsequently learned of four additional cases that were also "problems." Specifically, in First Trenton Indemnity v. Oseni ("Oseni") respondent did not provide answers to interrogatories; the client's answer to the complaint was stricken and default was entered. In Pellott v. Stefansky ("Pellott") respondent did not advise Goldberg, the insurance carrier or the client that the matter had not been properly prepared for arbitration, that arbitration had occurred, or that he had filed an appeal of the arbitration determination. In addition, respondent had been given responsibility for certain matters

litigated in Pennsylvania, including Silverman v. IMF ("Silverman") and Rubin v. IMF ("Rubin"), where problems in the files later surfaced.[2]

With regard to his handling of the above five matters, respondent stated that he was "ashamed" of his conduct in Anderson and was "not happy" with his handling of Pellott. He added that he filed appeals in Anderson and Pellott to protect his clients' interests. As to the other three matters, respondent testified that, in Oseni, he had never seen the motion to strike his answer or the motion for default. Respondent contended that he did not know about the default until so advised by the insurance adjuster. He stated that, upon learning of the default, he worked with the client and opposing counsel to reopen the matter. Similarly, he denied any misconduct in Silverman and Rubin.

Count Two

The complaint charged that respondent neglected the five above matters. In addition, as noted above, in 2002, he was reprimanded for misconduct in his handling of one client matter. The complaint charged respondent with a pattern of neglect when these matters were considered in concert.

Respondent testified that he no longer practices law in New Jersey and has no intention to do so. He is employed as in-house counsel to a utility company in Philadelphia. Respondent also noted by way of mitigation, his filing the appeals to

[2] Respondent testified that he was disciplined in Pennsylvania for his handling of Silverman and Rubin.

protect his clients, and his cooperation with the DEC and Office of Attorney Ethics ("OAE").

The DEC recommended that respondent receive a one-year suspension for violation of RPC 1.3, RPC 1.4(a) and (b), RPC 8.4(c), and RPC 1.1(b) (mistakenly cited as RPC 8.1(b).

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

Respondent raised several issues in his brief to the Board. First, he noted the time it took for the DEC to process this case, pointing out that, although the grievance was filed in October 2000, the hearing was not held until July 2002 and the DEC's determination did not issue until April 2003. Respondent also objected to the inclusion in the record of information about the Pennsylvania cases, which are unrelated to his conduct in New Jersey, and contended that, if he is suspended, he will face reciprocal discipline, despite "the identical grievance" having already been adjudicated in Pennsylvania. Finally, respondent stated that the presenter did not offer or move the exhibits into evidence and the panel should not have considered the documents.

As to respondent's arguments, although the delay in processing this matter is regrettable, it is not unheard of in the disciplinary system and was not prejudicial to the proceedings. In connection with the Pennsylvania matters, although the cases did not take place in New Jersey, they could have come before us on a motion for reciprocal discipline and can properly be considered. As to his having been disciplined in

Pennsylvania, presumably any reciprocal proceeding would be based only on Anderson, Pellott, and Oseni. Finally, with regard to the exhibits, the presenter filed a motion to expand the record to include her certification that respondent had reviewed the documents and had no objections to them. In addition, she certified that she had submitted the exhibits to the panel chair, stating that they had been stipulated into evidence.

We unanimously determined to grant the presenter's motion, and consider the exhibits as part of the record before us. We note that the inclusion of the exhibits in the record did not alter our determination as to the appropriate level of discipline in this matter.

With regard to count one, this is not a case where respondent abandoned his clients. Rather, respondent mishandled the cases and, after rulings adverse to his clients, filed appeals protecting his clients from the results of those rulings. Similarly, this is not a case of a young practitioner's being thrust into the fray without proper supervision. Respondent had been admitted to the bar for at least ten years at the time of his misconduct. Indeed, the record does not provide an explanation for what went wrong in these five cases. Respondent admitted his misconduct in Anderson and Pellott. In Oseni, he testified that he did not know about the motions until he was so informed after the fact by the adjuster. The fact remains, however, that it appears that he did not file answers to the interrogatories. As to the Pennsylvania cases, respondent denied misconduct in those matters, but conceded that he has been disciplined for them in a sister jurisdiction. Respondent violated RPC 1.3 and RPC 1.4(a) and (b). As to the allegation of

misrepresentation, although respondent denied any intent to mislead anyone, the fact remains that he had to have known at least about the problems in Pellott, about which he failed to advise Goldberg. In addition, he failed to advise his clients of adverse outcomes in their cases. In some situations, silence can be no less a misrepresentation than words. Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

As to count two, we are not in the habit of dredging up old cases to find an attorney guilty of a pattern of neglect and have not considered respondent's previous reprimand-inducing conduct with the matter at issue. Nevertheless, eliminating the 2002 matter from our review leaves five cases where respondent was less than diligent in his representation. Two of those are the Pennsylvania cases. These have been considered as part of the pattern of misconduct, in lieu of an OAE motion for reciprocal discipline.

Respondent argued that the one-year suspension recommended is too harsh. He is correct. In the past, similar misconduct has been met with a reprimand or brief term of suspension. In In re Zukowski, 152 N.J. 59 (1997), the attorney was reprimanded after he failed to diligently pursue a workers' compensation claim and failed to communicate with the client. In a second matter, the attorney grossly neglected a personal injury case. In In re Caruso, 151 N.J. 316 (1997), the attorney was reprimanded for lack of diligence in two matters and failure to expedite litigation in a third matter. A reprimand was also imposed in In re Carmichael, 139 N.J. 390 (1995) where the attorney failed to handle two matters with diligence and failed to communicate with the client. He had a previous private reprimand.

More serious discipline was imposed in In re Peluso, 156 N.J. 545 (1999). There, a three-month suspension was imposed where the attorney grossly neglected six matters, demonstrated a pattern of neglect, failed to abide by a client's decision, exhibited a lack of diligence, failed to communicate, failed to explain a matter to a client, demonstrated recordkeeping deficiencies and failed to surrender a client's file. In In re Olitsky, 154 N.J. 177 (1998) a three-month suspension was imposed where the attorney grossly neglected four matters, exhibited a pattern of neglect, lacked diligence, failed to keep his clients reasonably informed and failed to prepare a written retainer agreement. In In re Medford, 148 N.J. 81 (1997) a three-month suspension was imposed for gross neglect, lack of diligence, failure to communicate, failure to promptly deliver funds to a client, failure to surrender a client's file, practicing law while ineligible, misrepresentation, and failure to cooperate with disciplinary authorities.

Although the within matter does not contain all of the elements that elevated Peluso, Olitsky and Medford to the suspension level, respondent's lack of recognition of wrongdoing on his part in some instances is an aggravating factor that was taken into account. In addition, his failure to advise his clients of adverse rulings was a serious infraction. On the other hand, he took steps to remedy the harm to his clients by filing appeals, was remorseful about Anderson and Pellott, and is no longer engaged in private practice in New Jersey.

As to the timing of respondent's prior discipline, his reprimand was issued in 2002, two years after the within events. Thus, this is not a case of an attorney failing to

learn from his prior mistakes, which might have warranted the stiffer sanction of a suspension.

In light of the totality of the circumstances, we unanimously determined to impose a reprimand.

One member did not participate.

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

Disciplinary Review Board

Mary J. Maudsley, Chair

By: Julianne K. DeCore

Julianne K. DeCore
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Harry J. Kane, Jr.
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Disposition: Reprimand

Members	*Reprimand*	*Suspension*	*Disbar*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley	X						
O'Shaughnessy	X						
Boylan							X
Holmes	X						
Lolla	X						
Pashman	X						
Schwartz	X						
Stanton	X						
Wissinger	X						
Total:	8						1

Julianne K. DeCore
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Acting Chief Counsel