

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 00-223 and
00-224

IN THE MATTER OF

SHIRLEY WATERS-CATO AND

OLIVER W. CATO

ATTORNEYS AT LAW .
:

Decision

Argued: November 16, 2000
Decided: May 15, 2001

Walter Gigli appeared on behalf of the District VB Ethics Committee.
Respondent Cato appeared pro se.
Respondent Waters-Cato failed to appear, despite proper notice.

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

These matters were before us based on a recommendation for discipline filed by the District VB Ethics Committee (DEC). The matters were consolidated by the DEC for hearing purposes.

October 2, 1995 she was suspended for one year, retroactive to April 4, 1995, for gross neglect, pattern of neglect, false statement and failure to disclose a material fact to a seller's attorney [RPC 4.1(a)(1) and (2)], misrepresentations of the status of client matters, conduct prejudicial to the administration of justice and failure to cooperate with disciplinary authorities. In re Waters-Cato, 142 N.J. 472 (1995). On October 22, 1997 she received a three-year suspension for gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to return a client file upon termination of the representation and failure to cooperate with disciplinary authorities. In re Waters-Cato, 151 N.J. 492 (1997). On April 6, 1999 she was suspended for three months for gross neglect, lack of diligence, failure to communicate with the client and failure to cooperate with disciplinary authorities. In re Waters-Cato, 158 N.J. 12 (1999).

I *The Thurston Matter - District Docket No. VB-99-027E*

The first count of the complaint alleged that Waters-Cato violated RPC 1.1(a) (gross neglect) and (b) (pattern of neglect), RPC 1.4(a) (failure to communicate with the client), RPC 1.15 (failure to promptly deliver property to client), RPC 5.5(a) (practicing law while suspended) and RPC 8.1(b) (failure to cooperate with ethics authorities).

According to the complaint, Waters-Cato was retained by Lorraine Thurston to draft her will. The ethics grievance was filed by Lorraine Thurston's daughter, Kim Thurston-Foster, who testified by telephone from Virginia.

Thurston-Foster testified that Waters-Cato and her mother knew each other when both were nurses in New Jersey. She testified that she lived with her mother in New Jersey until 1996 and then moved to Virginia, in late 1996, to property owned by her mother. Shortly thereafter, in mid-1997, her mother moved to Virginia to be with her. According to Thurston-Foster, her mother had often asked her to obtain a copy of her will from Waters-Cato.

Lorraine Thurston passed away on November 3, 1998. Two days later, Thurston-Foster sent Waters-Cato a certified letter to her home address, requesting a copy of her mother's will. That letter was returned by the post office as unclaimed. Thereafter, Thurston-Foster sent the same letter twice more by regular mail, in hopes that Waters-Cato would receive it. Waters-Cato never replied. According to Thurston-Foster, she did not attempt to call Waters-Cato about the will because she did not know her office number and did not want to call her at home. In fact, Thurston-Foster had never met or spoken with Waters-Cato before filing the ethics grievance.

Thurston-Foster testified that the only evidence that Waters-Cato had drafted a will for her mother was her mother's word, adding that, from the beginning, all she wanted from Waters-Cato was to find out if there was a will.

Waters-Cato, in turn, testified that she met Lorraine Thurston in or about 1985, through a friend who represented Thurston in an unrelated matter. According to Waters-Cato, she had agreed to help the attorney in that representation, but she could not recall the

nature of the matter. Waters-Cato was certain, however, that she never represented Lorraine Thurston thereafter and, in particular, was never retained to prepare Thurston's will.

There is no other evidence in the record that Waters-Cato was ever retained to represent Lorraine Thurston.

II *The Cornelius Smith Matter - Docket Nos. VB-99-025E and VB-99-026E*

The remaining counts of the complaint alleged that both Waters-Cato and Cato violated RPC 1.1(a) (gross neglect) and (b) (pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with the client) and that Waters-Cato also violated RPC 5.5(a) (practicing law while suspended) and RPC 8.1(b) (failure to cooperate with ethics authorities).

In early 1995 Cornelius Smith retained Waters-Cato to represent her in connection with injuries sustained in a bus accident. Smith recalled having an initial conference at Waters-Cato's office, signing papers that day and being given copies of those documents. However, none of those records were produced at the DEC hearing. Smith also recalled speaking to Cato about her case at some later point in time, but did not specify when that conversation allegedly took place.¹

For her part, Waters-Cato admitted that she was retained to file a complaint in Smith's behalf and that, several months later, in April 1995, before she could file a

¹The record is vague with regard to most of the relevant dates in these matters.

complaint, she was suspended from the practice of law. She also admitted that she did not notify Smith of her suspension.

On January 8, 1997, the eve of the expiration of the statute of limitations on Smith's claim, Cato filed a complaint on Smith's behalf. According to Waters-Cato, her husband had agreed to take over Smith's representation and had become solely responsible for the case thereafter. Waters-Cato also testified that she met Smith at a church service one day, at which time she informed Smith that she had transferred the matter to her husband. Although Waters-Cato could not recall the date, according to her this conversation took place after the filing of the complaint. Furthermore, Waters-Cato stated, she communicated with Smith, in writing, to inform her about the progress of the case. Waters-Cato could not, however, produce any documents in that regard.² Waters-Cato asserted that, because she had fallen behind in rental payments, her landlord had locked her out of her office building. Accordingly, she claimed, she was unable to access her files. She admitted, however, that she never took any affirmative steps to gain access to her files.

At one point, Smith enlisted the aid of a nephew, Monroe Burger, to contact Waters-Cato about the status of the case. Burger testified that he once left a message for Waters-Cato at her law office, which message was not returned. Burger also testified that he called Waters-Cato's office ten to fifteen times over a two-year period and that no one ever answered the telephone. The record is silent about the dates of those calls. According to

²Smith denied that Waters-Cato told her about Cato's involvement in the case or that Waters-Cato apprise her of its status.

Burger, he and Smith finally “cornered” Waters-Cato at church, at which time Waters-Cato told them that “everything was going on all right” and that she would contact them in several weeks. According to Smith and Burger, respondent never did so. Later, at some unknown time, Burger called the defendant bus company and learned that the matter had been dismissed.

The complaint was dismissed for lack of prosecution on November 17, 1997. It is undisputed that neither respondent made any effort to reinstate the complaint. Each respondent, however, had slightly different versions of the subsequent events.

According to Cato, in 1995 he became concerned about his wife’s health because of certain problems occurring in her law practice. Cato testified that, at the time of these events, he was working in New York in a non-attorney capacity and that, without his wife’s income, first their finances, then their marriage, became strained. In an attempt to ward off further deterioration of their marriage, Cato claimed, he offered to file Smith’s complaint before the statute of limitations expired, believing that thereafter Waters-Cato would manage the paralegal aspects of the case, while he would handle its legal aspects. He used Waters-Cato’s office to draft the complaint and placed her office address on the pleadings. As noted earlier, Waters-Cato’s testified that her husband had taken over the Smith representation and had become responsible for the case thereafter.

According to Cato, after he filed the complaint, their marriage deteriorated even further, to the extent that they barely spoke to each other and never discussed problems with

Waters-Cato's law practice. As a result, Cato testified, Smith's case became entangled in their personal problems and was forgotten. Cato admitted that he never contacted Smith about her case after the filing of the complaint, that he neglected the case and that he took no action to prevent its dismissal or to communicate with Smith. Cato testified that he was unaware of the dismissal of the complaint until the ethics proceedings. Moreover, he appeared to be candid about his involvement in Smith's case. He explained that he was motivated by a desire to help his wife, who was experiencing great difficulty managing her responsibilities as an attorney during this time.

As to the allegations that Waters-Cato failed to cooperate with the DEC's investigation of the grievances, she stated numerous times on the record that she had decided, in or about the time of her 1995 suspension, not to accept certified mail from anyone because she could not "cope" with it. Indeed, although she did not deny receiving correspondence from the DEC about these matters, she stated that, for the same reason, her practice was to accept, but not open, regular mail from the DEC. She testified that she went so far as to consult with a "spiritual," in order to determine whether or not to open and read correspondence from the DEC. She also failed to file an answer to the ethics complaint. She testified that it had been tremendously difficult for her to summon the courage to appear at the DEC hearing.

Cato, too, testified about his alleged failure to cooperate with the DEC. He did not deny his failure to initially reply to several DEC letters requesting information about the

within matters and his initial failure to answer the ethics complaint. He stated that he had never been the subject of disciplinary proceedings before and that, initially, he had become frozen with fear. Eventually, Cato filed an answer to the complaint, in which he admitted his wrongdoing. He cooperated fully with the DEC thereafter.

Lastly, the complaint charged that Waters-Cato undertook Smith's representation when she was already suspended from the practice of law.

* * *

In Thurston-Foster, the DEC dismissed the allegations against Waters-Cato. Nevertheless, the DEC found that her conduct in the matter constituted evidence of a pattern of neglect. In Smith, the DEC's findings are unclear. Presumably, the DEC found violations of all of the RPCs cited in the complaint.

The DEC recommended a three-year suspension for Waters-Cato, to be served consecutively to any prior suspensions, and proof of fitness by a psychiatrist, before reinstatement. The DEC recommended that Cato receive a reprimand.

* * *

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that

respondents were guilty of unethical conduct is fully supported by clear and convincing evidence.

In Thurston-Foster, the DEC correctly dismissed the allegations of the complaint. The only evidence that Waters-Cato was retained to draft a will for Lorraine Thurston was the testimony of her daughter, Kim Thurston-Foster. That testimony was based solely on conversations that, Thurston-Foster alleged, she had with her mother. We found that the evidence in this matter did not rise to the level of clear and convincing proof and, therefore, dismissed it.

As to the Smith matter, however, we found that the record fully supports a finding of misconduct by both respondents.

It is undisputed that Waters-Cato was retained in 1995 to represent Smith in the bus accident litigation. Thereafter, she took no action in Smith's behalf. Her failure to prosecute the matter during the several months between her retention and her first suspension in April 1995 did not rise to the level of gross neglect or even lack of diligence. It was Waters-Cato's conduct after her suspension – her failure to protect her client's interests by disclosing her suspension and urging her client to retain new counsel – that caused the complaint to be dismissed for lack of prosecution. Therefore, we dismissed the charges that Waters-Cato violated RPC 1.1(a) and RPC 1.3.

Undeniably, however, after her April 1995 suspension, Waters-Cato simply “shut down” and ignored her responsibilities to Smith, including the duty to notify her of the

suspension, in writing, so that she could engage another attorney. Furthermore, by transferring the file to her husband, Waters-Cato prevented Smith from retaining an attorney of her choice. Her conduct violated R. 1:20-20, mistakenly cited in the complaint as RPC 5.5.

Waters-Cato also failed to keep Smith informed about her case both before and after the dismissal of the complaint. In fact, respondent had to be “cornered” at church services by Smith, and later Burger, so that they could ask for information about the case. We found, thus, that Waters-Cato violated RPC 1.4 (a).

Another issue was not explored by the DEC: Waters-Cato’s misrepresentation by silence during her meeting with Smith in church. Waters-Cato testified that, during the church meeting, she had told Smith that the case was now being handled by Cato. Yet, Waters-Cato did not disclose to Smith that she had been suspended from the practice of law and, therefore, could no longer represent her. We found therefore, that Waters-Cato also violated RPC 8.4(c), in addition to R. 1:20-20. Although Waters-Cato was not specifically charged with a violation of RPC 8.4(c), she testified that she had told Smith that the matter had been transferred to Cato, without saying anything about her suspended status. We, therefore deemed the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

There is no evidence, however, that Waters-Cato practiced law after being suspended. She was not yet suspended when she was retained by Smith and there is no indication that

she represented Smith post-suspension. Therefore, we dismissed the charge of a violation of RPC 5.5(a).

Finally, Waters-Cato did not dispute that she failed to cooperate with ethics authorities. Her explanation was that she was unable to open correspondence from the DEC because of the traumatic effect that it had upon her.

We were unable to find, however, that Waters-Cato violated RPC 1.1(b). Since we found that the conduct did not amount to gross neglect, there is no basis for a finding of a pattern of neglect.

In sum, thus, Waters-Cato violated RPC 1.4(a), R. 1:20-20, RPC 8.4(c) and RPC 8.1(b).

As to Cato, he admitted that he neglected the Smith matter by allowing the complaint to be dismissed and that he did not communicate with Smith after the filing of the complaint. His conduct, thus, violated RPC 1.1(a), RPC 1.3 and RPC 1.4(a). Because, however, ordinarily three instances of neglect are required for a finding of pattern of neglect, we dismissed the charge that Cato violated RPC 1.1 (b).

With regard to allegations that he violated RPC 8.1(b), it is undeniable that he initially did not reply to the DEC's requests for information about the grievance or promptly answer the ethics complaint. However, he explained that he had frozen with fear, when under question by the ethics system for the first time. Once he gathered himself and filed his answer to the ethics complaint, he was forthright in his dealings with the DEC and was

able to shed light on some aspects of the matter that otherwise might not have been unearthed. We found that Cato's ultimate cooperation with ethics authorities justifies a dismissal of the RPC 8.1(b) charges.

One final aspect requires mention. RPC 5.5 and R.1:21-1 require that attorneys practicing law in New Jersey maintain a bona fide office in this state for that purpose. R.1:21-6, in turn, requires every attorney who practices in New Jersey to maintain trust and business accounts in an approved New Jersey financial institution. The bona fide office rules are designed to ensure that attorneys can be held accountable for their actions and are available to clients, courts and adversaries alike. Obviously, Cato's admission that he had no New Jersey office at the time that he filed the Smith complaint means that he violated the bona fide office rules, albeit perhaps in a purely technical sense – Smith testified that she was unaware that Waters-Cato had transferred the matter to Cato and obviously would not have sought him out as her attorney. Nevertheless, we are constrained to find a violation in this regard.

We are left with the issue of discipline for these respondents. This is Cato's first brush with the ethics authorities in over twenty years at the bar. We also note that, although he "dropped the ball" in the Smith matter, he was motivated by a desire to help his wife. Ordinarily, cases involving failure to maintain a bona fide office alone result in the imposition of a reprimand. In re Kasson, 141 N.J. 83 (1994) (reprimand imposed for failure to maintain a bona fide office after a trial judge was unable to reach an 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) (post-Kasson case; 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 post-Kasson, for failure to maintain a bona fide office while representing an estate; attorney's representation in New Jersey was confined to one matter.)

As in Beck and Guyer Young, we unanimously felt that the mitigating factors in this case justify the imposition of only an admonition for Cato's lack of a bona fide office, as well as his mishandling of the Smith matter.

Stern discipline, however, is required for Waters-Cato. She is a recidivist who received a private reprimand in 1991, a three-month suspension in 1995, a one-year suspension later that year, a three-year suspension in October 1997 and, most recently, a three-month suspension in April 1999 (to be served at the conclusion of the immediately preceding suspension), effective October 22, 2000. At first blush, we might be tempted to say that she has not learned from her mistakes. Her misconduct in Smith, however, was limited to the several months before she was suspended in April 1995. In addition, by the time of her unethical conduct in this matter, her disciplinary record included only the prior private reprimand imposed four years earlier. All of the suspensions took place afterwards. An aggravating factor, however, was her attempt to blame her husband for all of the

mistakes in the case, thereby showing unwillingness to take responsibility for her own inaction.

Ordinarily, a reprimand to a three-month suspension would be the appropriate degree of discipline for this type of misconduct in one or two matters, where the attorney had a prior ethics record. See, e.g., In re Yusem, 155 N.J. 595 (1998) (reprimand imposed where the attorney exhibited a lack of diligence in a collection matter, failed to keep the client reasonably informed about the status of the matter, failed to communicate with the client and failed to cooperate with ethics authorities in the investigation of the matter; the attorney had a prior private reprimand for failure to take required action for over two and one-half years as an assignee and for failure to reply to requests for information from the grievant and ethics investigator); In re Olitsky, 154 N.J. 177 (1998) (three-month suspension imposed for a combination of gross neglect, lack of diligence, failure to communicate and failure to utilize retainer agreements; the enhanced discipline was based on the attorney's ethics history, which included a prior private reprimand, admonition and three-month suspension) and In re Page, 156 N.J. 432 (1998) (three-month suspension imposed where the attorney allowed his client's action for malicious prosecution, which arose out of a municipal matter, to be dismissed; the attorney failed to inform the client of the filing of the complaint or its subsequent dismissal and took no further action thereafter; the attorney had received an admonition in 1995 for lack of diligence, failure to communicate with the client and failure to cooperate with ethics authorities in the investigation and was reprimanded in

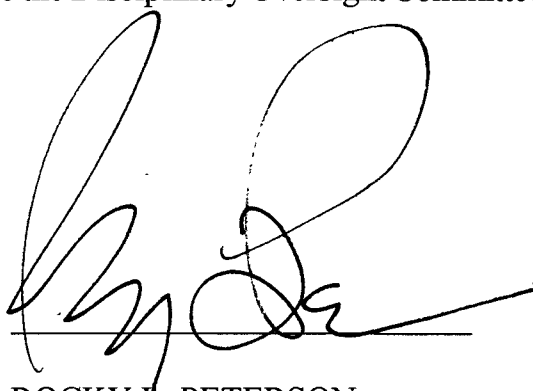
1997 for similar misconduct) .

Waters-Cato has an extensive disciplinary record, which includes two suspensions of three months each, plus a one-year suspension and a three-year suspension. Indeed, this is the sixth time that she has been before us for final discipline. She has repeatedly shown utter disregard for her clients' well-being and extreme indifference to the ethics authorities. In light of the foregoing, we unanimously determined that a six-month suspension is the appropriate degree of discipline for this respondent. The suspension is to be served at the conclusion of the suspension that expired on January 22, 2001. In addition, she must furnish proof of fitness to practice by a psychiatrist approved by the Office of Attorney Ethics (OAE) prior to reinstatement, must complete twelve hours of professional responsibility courses and, upon reinstatement, practice under a proctor approved by the OAE for an indefinite length of time.

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

Dated:

May 15, 2001

A handwritten signature in black ink, appearing to read 'Rocky L. Peterson', written over a horizontal line.

ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

*DISCIPLINARY REVIEW BOARD
VOTING RECORD*

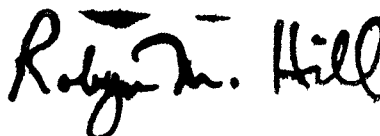
**In the Matter of Oliver W. Cato
Docket No. DRB 00-223**

Argued: November 16, 2000

Decided: May 15, 2001

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	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:				9			



Robyn M. Hill
Chief Counsel

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Shirley Waters-Cato
Docket No. DRB 00-224**

Argued: November 16, 2000

Decided: May 15, 2001

Disposition: Six-month suspension

Members	Disbar	Six-month Suspension	Reprimand	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:		9					



Robyn M. Hill
Chief Counsel