SUPREME COURT OF NEW JERSE
Disciplinary Review Board
Docket No. DRB 91-008

IN THE MATTER OF

JOHN L. DOWNER, JR.,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 20 and March 20, 1991

Decided: May 23, 1991

Roger J. Desiderio appeared on behalf of the District VB Ethics Committee.

John L. Downer appeared pro se.

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

This matter is before the Board based upon a recommendation for public discipline filed by the District VB Ethics Committee.

Respondent was admitted to the New Jersey bar in 1985. This presentment consolidated three matters heard together by the District VB Ethics Committee.

I. Suburban Business Machine Matter (VB-88-38E)

Respondent stipulated the following facts:

On October 6, 1987, respondent purchased from Suburban Business Machines ("SBM") an IBM typewriter for $975.47 that he

used in his practice and in connection with a title insurance business that he conducted from his law office (1T77; 2T58)[1]. Respondent twice issued checks to SBM drawn on his Contemporary Title Agency business account, which checks were returned for insufficient funds. On April 6, 1988, SBM filed criminal charges against respondent in Union Municipal Court for issuing bad checks and theft by deception. After respondent failed to appear on the trial date of July 25, 1988, a bench warrant was issued. When respondent was stopped for a speeding violation and the warrant came to light, he posted $1,500 to avoid being incarcerated (2T15). The trial was rescheduled for July 17, 1989. Once again, respondent did not appear, as a result of which a second warrant was issued.

When respondent was asked by the committee why he had not cleared up this situation, he testified he could not reach the court clerk (who was on vacation) and, until respondent obtained a job in July 1989, he did not have the money to make restitution to SBM (2T5; 2T11). Respondent promised the committee he would resolve this matter on October 2, 1989, when the clerk returned, and would provide written documentation of the resolution to the committee. This documentation has never been provided to the committee or the Board.

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[1] 1T refers to the transcript of the hearing before the District VB Ethics Committee on August 29, 1989.

2T refers to the transcript of the hearing before the District VB Ethics Committee on September 13, 1989.

The committee found respondent's conduct to be in violation of RPC 8.4(b) and (c), and part of a violation of RPC 1.1(b) (pattern of neglect), when considered along with the following two matters.

II. Yeager Matter (VB-89-66)

Respondent was retained to represent William Yeager, who was charged with aggravated assault upon his girlfriend. When initially retained, respondent did not know his client had also been charged with two instances of disorderly conduct. By October 14, 1988, Yeager's family had paid respondent $570 to represent him at a hearing, on October 19, 1988, on the aggravated assault charge. Yeager's mother testified that respondent had told her he could not appear on October 19, 1988 because of a death in his family. He then called her back and said he would appear on that day (2T16-17). The municipal court clerk testified she was contacted by respondent, who told her he needed to appear before another judge in Essex County on the same date and could not appear on October 19th (1T45; Exhibit P-6). Respondent testified he did have an emergent matter and that the reason the clerk could not find him on the Essex County's calendar, when she contacted that court, was that she had the wrong client's name (2T43). He did not provide any explanation as to why he told the clerk one set of facts and the Yeager family a different set of facts. At the Board hearing, respondent provided a document indicating that he had participated in a funeral in Saint Croix on October 22, 1988. He offered no reason as to why he told the clerk a different story,

confirmed that story to the committee, and then contradicted that very story at the Board hearing.

On October 26, 1988, respondent represented Yeager on one of the other disorderly conduct charges, but not on the charge for which he had been hired. He admitted that, at the end of that trial, he still expected to represent Yeager on the original matter, but that he quickly changed his mind when he did not receive payment for the second matter (2T68-69). He also admitted he never communicated his withdrawal on the first matter to either his client or the court. When respondent failed to appear at the trial of the first matter, the court appointed a public defender to represent his client. Respondent never refunded the $570 to his client but, instead, kept the money as payment for his services in the second matter (2T94).

The committee found that respondent had lied to the municipal court clerk in order to avoid appearing on October 19, 1988, in violation of RPC 4.1(a)(1) and RPC 8.4(d). The committee also found that he did not act with diligence or expedite the litigation, in violation of RPC 1.3 and RPC 3.2. The committee further found that he did not properly terminate his representation of his client, in violation of RPC 1.16(d), and that his actions as a whole in this matter constituted conduct prejudicial to the administration of justice, in violation of RPC 8.4(d).

III Gonzalez Matter (VB-88-39E)

Respondent originally represented Mr. and Mrs. Jose Gonzalez when he was employed by the Essex County Legal Aid Association. When he left Legal Aid, the Gonzalezes asked him to continue to represent them; they paid respondent $225 in cash in early April 1987 for his services (Exhibit PG-37).[2]

Jose Gonzalez ("Gonzalez") testified that he had purchased a three-family dwelling in Irvington, New Jersey, at a city auction, and that later he had given the deed to the property to a Charles Jennings (1T139-140). The Gonzalezes claimed that Jennings had secured ownership of the property through fraud, and that they had gone to Legal Aid to have the ownership of the property restored to them.

Eventually, Jennings sought to dispossess the Gonzalezes for non-payment of rent. The attorney hired by Jennings, Attorney M., testified that he had no knowledge of how Jennings had obtained title to the property. Jennings did not testify at the ethics hearing (4T101).

A stipulation of settlement, negotiated by respondent and Attorney M., was entered before the Essex Superior Court on February 10, 1987 (PG-5 in evidence). The stipulation provided that, from March 1987 through November 1987, the Gonzalezes would pay Jennings $730 per month. The stipulation also provided that,

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[2] Although all exhibits were marked for identification only, they were treated by both respondent and the committee as admitted into evidence.

if the Gonzalezes faithfully paid the $730 sum, they would have an option to purchase the property. Jennings also had the right to force the option starting in September 1987, which would then give the Gonzalezes sixty (60) days to obtain a mortgage commitment; if the parties could not agree on the purchase price, the agreement arranged for the sharing of a fee for an independent appraisal to establish a fair market price. The stipulation finally provided that, if the Gonzalezes failed to pay the sum due each month, they would be in breach of the stipulation and the option to purchase would terminate, whereupon they would become tenants of Jennings. From March 1987 until October 1987, Gonzalez paid cash to respondent, who issued checks on his trust account to Attorney M., for delivery to Jennings.

In November 1987, Attorney M. filed a notice of motion seeking to enter a judgment of possession against the Gonzalezes, to remove them from the property for non-payment of the monthly sum. Respondent admitted that, although he received the motion, he prepared no opposing papers and that, at the court hearing on December 4, 1987, he did not offer two possible defenses to the motion: first, that all payments had, in fact, been made; and second, that possession was not the action permitted for non-payment under the stipulation. At first, respondent could not remember being present in court on December 4, 1987 (2T112); thereafter, he testified that he did tender a defense in the judge's chambers on that day (2T128).

Respondent also testified that he had not filed an appeal and that it did not occur to him to file an appeal (2T129). Despite this assertion, he also testified that he had told the Gonzalezes about the costs and fees of an appeal and that they were not prepared to spend the money. Gonzalez' testimony was that he never talked with respondent on the day of the hearing and never discussed an appeal with him; in fact, he directed another attorney to find out what was occurring because he no longer trusted respondent (2T174-179).

The motion requesting repossession also stated that respondent had failed to provide the promised appraisal for which Jennings had paid half the fee. Respondent admitted he had not done so, even though he had obtained the appraisal (2T121).

The committee granted respondent a two-week recess to produce his files in this matter, which he did not do. The committee found that respondent had inadequately advised his clients, and had failed to represent his clients properly on December 4, 1987, in violation of RPC 1.1(a), RPC 1.1(b), and RPC 1.3.

Respondent's lack of cooperation in not producing his files and the abysmal state of his trust account and client ledger cards made it impossible for the committee to determine whether there was knowing misappropriation. In its report, the hearing panel concluded that there was no clear and convincing evidence of "misuse or conversion of funds" by respondent, but the panel also found that there was a violation of RPC 1.15(b) by respondent's

failure to promptly deliver to a third party any funds that the third party was entitled to receive.

The transcript of the committee hearing indicates that the panel chair provided the other panel members with his own notes reconstructing the testimony as to which payments had been sent to Attorney M. and which receipts Gonzalez had for his cash payments (these notes were not admitted into evidence). It was the chair's understanding that Gonzalez had seven receipts and that Attorney M. testified he had received seven payments. The chair concluded that, although the dates are all mismatched, respondent had not kept any of his clients' funds (1T158-167; 2T137-139).

The presenter did not agree with the chair's computation. He argued that attorney M. testified with certainty that he received six payments between March 1987 and August 1987, that he received a check in September, which he had to return to respondent because it was unsigned, and that he never received another check to replace the unsigned September check (2T116-117).[3]

Respondent testified that, although Gonzalez could only produce cash receipts starting in May (Exhibit PG-34), he would not have advanced money on Gonzalez' behalf before he received the money from Gonzalez (2T165). Therefore, although Gonzalez could not produce receipts for March and April, respondent believes Gonzalez gave him the cash for those months. Respondent also

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[3] Check #1524 of August 24, 1984 was returned by the bank for insufficient funds. There was no testimony at the hearing on this item being returned (Exhibit PG-38 at 2; Exhibit PG-27A at 4). This returned check means Attorney M. actually received only five payments.

confirmed Attorney M.'s testimony that the September payment was never negotiated through his trust account (2T166), and that there was no indication in his records that he made an October payment, even though Gonzalez had cash receipts for both September and October (2T167).

When the presenter was asked if he was suggesting there was a knowing misappropriation, given the lack of September and October payments, the presenter replied that he thought respondent had no idea about what he had done with the money, and that he would leave that issue to the committee's determination (2T178-180).

IV General Recordkeeping Violations

Respondent testified that his trust account did not reflect all his cash deposit or check deposits:

> A: It does not reflect complete deposits that I have made on this account and the audit record made reference to the fact that I had not indicated on [sic] the trust book on [sic] check stubs various deposits that were made.
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> Q. Do you know where it is you memorialized those deposits?
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> A. In certain situations they were not memorialized.
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> Q. So you cannot testify here today as to whether or not that money was deposited into that account, is that correct?
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> A. That's correct, not today or ever.
>
> Q. Ever?

A. Yeah, I did not memorialize nor do I have ledger sheets. The audit report speaks to my failure to maintain my books in proper fashion and specifically it speaks to those [sic] same issues.

[2T136]

. . .

[I] opened up on Prospect Street with no idea how to handle books or do accounting or anything else. In fact, I think through junior high and high school I flunked math every single year. I still do not know too well how to add and subtract. That was no excuse, the fact that I should not maybe have engaged in a specialty area such as real estate without having someone else such as an accountant handle books for me. That particular atmosphere has served to create the havoc that it has in my practice with all three of these matters.

[2T184-185]

Aaron Van Duyne, a certified public accountant, examined respondent's business and trust account records for the period of February 1987 to February 1988. He had no way of tracking any cash received from Gonzales that was not recorded. He stated as follows:

> The conditions of the attorney trust account records are poor at best. The trust account had not been reconciled nor had any schedule of clients funds been compared to the trust checkbook. There were no running balances in the trust checkbook. Most of the checkstubs were not descriptive and some of the checkstubs were written under the wrong checkstub number. There is a trust receipts and disbursement journal but that is also not descriptive. The trust ledger contained a few clients but again was incomplete or not fully descript [sic].
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> [Exhibit PG-38 at 2.]

The accountant also stated that, due to the condition of the records, the reconstruction of the trust account was partly a guess, at best.[4]

V Bona Fide Office Violation

Although not charged with bona fide office violations in any of the formal complaints, respondent admitted that, during the pendency of these three matters, he did not always have an office:

> There was a sudden split between myself and the attorney [on May 1, 1987] and I found myself without an office, without a secretary or any equipment. At some point I was moving my office from a studio apartment where I was living in a one bedroom apartment where I was living in my parents' house to a friend's house. There were items, dates, that I did not observe throughout that time because of the confusion.
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> [2T19]

The committee found that respondent had violated R. 1:21-1(a) and, therefore, RPC 5.5(a) (unauthorized practice of law), by failing to maintain a bona fide office.

VI Lack of Cooperation

Respondent attended the two committee hearings, but he never answered the complaints, never answered the investigator's requests for information, and never provided the files promised to the

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[4] An example that this report is incomplete is seen on page 2 of the accountant's letter, where he refers to the September check of $730 balancing the Gonzalezes' account; he did not know that the check had not been negotiated because it was unsigned. The accountant did not testify at the committee hearing, and this missing information in the report was not fully explored by the committee.

committee. Although the formal complaints do not charge respondent with failure to cooperate with the ethics system, the committee nevertheless found that respondent's conduct had violated RPC 8.1(b).

Respondent offered some general mitigation to the committee concerning his physical health, but because he did not produce any medical reports, the committee attached no weight to his verbal representation that he suffered from a memory problem. Respondent contended he has been treated by both a psychiatrist and a neurologist, but did not provide the reports to the hearing panel because, according to respondent, he had not paid for this treatment and, therefore, the reports had not been released (2T186). At the Board hearing, respondent did provide copies of these medical reports. A neuropsychological evaluation by Dr. Kenneth Perrine, Ph.D., indicated that respondent had a significant drug and alcohol abuse problem, along with mild memory problems. Respondent also acknowledged that he should not be in private practice and that he has no intention of returning to private practice (2T188).

The committee recommended a five-year suspension with re-admission to be accompanied by a physical and psychiatric report confirming fitness to practice law. The committee further recommended that, if respondent is allowed to resume practice, he should be supervised by a proctor for a period of five years.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. Respondent (1) committed a criminal act that reflects adversely on his honesty, in the SBM matter, in violation of RPC 8.4(b) and (c); (2) displayed a pattern of neglect, in violation of RPC 1.1(b); (3) displayed gross negligence in the Yeager and Gonzalez matters, in violation of RPC 1.1(a); (4) improperly withdrew from representation in the Yeager matter, in violation of RPC 1.16(d); (5) misrepresented to a court clerk his reasons for not appearing in court, in violation of RPC 4.1(a)(1) and RPC 8.4(d), in the Yeager matter; (6) failed to cooperate with the ethics committee, in violation of RPC 8.1(b); (7) did not maintain a bona fide office, in violation of R. 1:21-1(a) and RPC 5.5(a); (8) failed to promptly deliver to a third party the client's property, in the Gonzalez matter, in violation of RPC 1.15(b); and (9) failed to comply with the recordkeeping rules, in violation of R.1:21-6 and RPC 1.15(d). For the reasons set forth below, however, the Board is unable to agree with the committee's recommendation that a term of suspension be imposed.

The most serious charge against respondent is his failure to promptly deliver to Attorney M. the monthly payments received from Gonzalez. Indeed, although there is a suspicion of negligent misappropriation, the evidence of misuse of funds is not clear and convincing because of the lack of receipts on the part of Gonzalez

and the absence of records on respondent's part. Nonetheless, respondent clearly did not keep ledger cards recording deposits into and disbursements from the trust account in this case, as required by R.1:21-6. Respondent failed to recognize or understand that "part of [his] responsibility to the legal system is the maintenance and supervision of accounting records." In re Orlando, 104 N.J. 344, 350 (1986).

The Board also agrees with the committee that respondent's failure to file answers to the formal complaints violated R.1:20-3(1) and RPC 8.1(b). However, the Board notes that this misconduct is significantly mitigated by the fact that respondent did appear and give testimony at the committee level and did provide medical documentation to the Board.

Indeed, the medical documentation indicating a substance abuse problem and a mild memory deficiency also appears to explain and mitigate respondent's two different versions as to why he did not appear in court on October 19, 1988 in the Yeager matter. Respondent's behavior certainly does not meet professional standards of performance, but his personal turmoil, rather than any malicious intent, seems to be the basis of this conduct. Moreover, respondent apparently had a valid excuse for not being able to appear in court on that day. In this regard, respondent's conduct was not nearly as serious as that of other attorneys who have come before this Board on charges that they lied when they claimed that they could not be in court on a particular day, with no other valid reason justifying their absence.

There remains the issue of appropriate discipline. In In re Mahoney, 120 N.J. 155 (1990), the Court imposed a public reprimand with a one-year proctorship on an attorney who exhibited a pattern of neglect in four matters, failed to maintain trust account records and made a misrepresentation in another matter. In In re Beck, 118 N.J. 561 (1990), the Court imposed a public reprimand with a two-year proctorship for a pattern of neglect in three matters, gross neglect in one matter, failure to notify a client of a settlement conference, and failure to adequately communicate with clients.

In determining the proper discipline to recommend, the Board is mindful that the purpose of discipline is the protection of the public and not the punishment of the attorney. The discipline to be imposed must comport with the seriousness of the ethical infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors are, therefore, relevant and may be considered. In re Hughes, 90 N.J. 32, 36 (1982).

In this case the mitigating factors are significant. At the Board hearing, respondent provided neurological and psychological evaluations that indicated memory problems possibly due to head injuries, which were exacerbated by long-term drug and alcohol abuse. Furthermore, he testified that, after one of his doctors suggested that he attend Alcoholics Anonymous, he stopped using either alcohol or drugs and ended contact with drug-using friends by moving to Atlantic City, where he has found a responsible

position as an attorney. He has continued to abstain from drug and alcohol use since February 1990. This is not a case where respondent is claiming simple stress or work overload, but a documented medical problem that, respondent indicates, is well on the way to being successfully treated. In In re Willis, 114 N.J. 42 (1989), the Court recognized the successful rehabilitation of an alcoholic lawyer as a significant factor in mitigating unethical conduct.

Furthermore, respondent admitted he felt incapable of practicing law in a private setting because he did not have the necessary training in keeping financial records, or other business aspects of running a law office. Respondent testified at the Board hearing that he has addressed this concern by leaving the private practice of law and finding employment for the last year with the Atlantic County public defender's office.

The Board recognizes respondent's successful efforts to rehabilitate himself by abstaining from substance abuse and obtaining supervised employment. A suspension at this time would be punitive and not serve the purpose of justice. "Discipline should always be intended primarily to protect the public interest but should also encourage the rehabilitation of the offending lawyer." In re Urbanick, 117 N.J. 300, 309 (1989). In order to protect the public, a requisite majority of the Board recommends a public reprimand with the added conditions of a proctor for three

years[5] and regular urine testing to rule out drug or alcohol use.

One member dissented, recommending a short period of suspension. However, this Board member also stated that, if a suspended suspension were an option under current law, that option would have been chosen.[6] Such an option would recognize the seriousness of past behavior, and yet acknowledge respondent's successful rehabilitation. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Date: 5/23/91

Raymond R. Trombadore
Chair
Disciplinary Review Board

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[5] The Board recognizes that even though respondent is a supervised public employee, the Public Defender has no obligation to monitor him as closely as warranted, given these charges, unless a particular person is assigned as respondent's proctor.

[6] The Court has only allowed suspended suspensions where considerable time has elapsed since the offense, which is not the case in this matter. See In re Kotok, 108 N.J. 314 (1987); In re Stier, 108 N.J. 455 (1987).