SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-041

IN THE MATTER OF :
:
GERALD WEINGART, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 19, 1991

Decided: October 3, 1991

Richard J. Kozel appeared on behalf of the District XI Ethics Committee.

Herman Osofsky appeared on behalf of respondent.

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

This matter is before the Board based upon a presentment filed by the District XI Ethics Committee.

Respondent was admitted to the New York bar in 1963 and to the New Jersey bar in 1970. He has had no prior discipline. The facts in this matter were stipulated and entered into evidence as Exhibit J-3, as follows:

1. Respondent, Gerald Weingart, Esquire, maintains offices at 56 Evelyn Terrace, in the township of Wayne, County of Passaic, and State of New Jersey.

2. Respondent was admitted to the bar of New Jersey in 1970, and to the bar of the State of New York in 1963.

3. Respondent has not had any prior disciplinary problems or proceedings, either in New Jersey or New York.

4. Jonathan Kliegman was a personal friend and acquaintance of respondent, having known him for approximately fifteen years.

5. Respondent represented Mr. Kliegman in the purchase of the business known as Sani-Clean Maintenance Corp. from Phillip Caprio, Marvin Steinberg, Tri-Maintenance Corp., and AVC T/A Atlas Cleaning Corp., which took place on January 1, 1981.

6. Subsequent to the sale of the business, a dispute arose as to the quality of certain accounts.

7. Approximately in the summer of 1981, respondent was contacted by Mr. Kliegman to commence litigation regarding a potential breach of contract and/or fraud claim, wherein it appeared that the Sellers had begun to acquire certain accounts sold to Kliegman under different business names.

8. Respondent agreed to represent Mr. Kliegman, although no Retainer Agreement was executed and no fees were requested despite offers by Mr. Kliegman to make payment.

9. Respondent never specifically advised Kliegman when he was to commence suit. However, in the summer of 1983, respondent advised Kliegman that suit was started as of April 15, 1983.

10. For approximately the next three years respondent advised and represented to Kliegman that:

    A) Suit had been filed.

    B) Respondent attended a pre-trial conference with the Honorable John A. Marzulli in Essex County.

    C) Several trial dates had been assigned.

    D) The Court's file had been repeatedly mislaid.

    E) Court personnel were unable to locate the file.

11. On December 10, 1986, respondent wrote to Governor Thomas Kean and the Attorney General to complain about the mislaid file. (copies of both letters are annexed).

12. As a result of a referral from the Governor's office, the Administrative Office of the Courts began an inquiry. Respondent supplied a copy of the purported 1983

Complaint, which is annexed. The Complaint contained an illegible filing stamp, and an inappropriate docket number which otherwise was not available as of the purported date of filing.

13. Kliegman, on November 11, 1986, wrote to Senator Joseph Bubba, and to other officers, continuing to inquire as to the status of this action. (copy of the letter is annexed).

14. On April 15, 1987, respondent properly filed the original suit in Essex County under Docket Number L-063654-87. On December 1, 1988, respondent filed a duplicate suit in Passaic County, under Docket Number W-002954-88. (Copies of both Complaints are annexed). These matters were never prosecuted, and have, in all likelihood, been dismissed by the Court.

15. On January 15, 1988, Jonathan Kliegman executed a release to respondent for the sum of $75,000.00 which released all claims. (A copy of the Release is annexed.) Respondent borrowed funds from various family members, and has paid the agreed to settlement figure in full.

16. Respondent admits that he misrepresented to Jonathan Kliegman that:

A. He commenced suit.

B. Suit was pending for approximately three years.

C. Respondent attended a pre-trial conference with Judge Marzulli.

D. Multiple trial dates had been assigned.

E. The Court file had been mislaid, and Court personnel could not locate same.

17. Respondent further admits that the above misrepresentations were made with the knowledge that same were false, and were made with the intention of misleading Jonathan Kliegman.

18. Respondent admits to a violation of RPC 1.3 (due diligence), RPC 1.4(a) (failure to communicate honestly), RPC 8.4(c) (dishonesty and misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

19. Respondent reserves the right to present information in

mitigation of his conduct, in accordance with In re Dreier, 94 N.J. 396 (1983).

20. Respondent has freely and voluntarily executed the within Stipulation, having been fully advised of his right to contest this matter. Respondent further waives the requirement that the essential elements of the Complaint be proved against him. He hereby withdraws his answer, other than the reservation set forth in paragraph 19 above.

Respondent admitted, and the committee found, that he had violated RPC 1.3, RPC 1.4(a), RPC 8.4(c) and RPC 8.4(d).

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 supported by clear and convincing evidence.

Discipline for conduct involving gross neglect and misrepresentation has ranged from a public reprimand to a term of suspension, depending on the seriousness of the unethical acts. See In re Mahoney, 120 N.J. 155 (1990), (where the attorney was publicly reprimanded for exhibiting a pattern of neglect in four matters, failing to communicate with his clients and misrepresenting that a discharge on a mortgage had been sent for recording); In re Ritger, 115 N.J. 50 (1989), (where the attorney was suspended for six months after engaging in a pattern of neglect and misrepresenting the status of an estate matter over a period of several years); In re Cullen, 112 N.J. 13 (1988), (where the

attorney was suspended for six months for grossly neglecting a personal injury matter and wrongful death case. Thereafter, he ignored his client's requests for information and misrepresented the status of the matters by indicating that they were progressing satisfactorily).

In the present matter, however, respondent's conduct was far more serious and warrants the imposition of more severe discipline. His numerous instances of misrepresentation and the time span they covered -- three years -- are alarming. Respondent lied not only to his client but to the offices of the governor and of the attorney general as well as to court personnel. Moreover, his lies set into motion formal inquiries from those offices and from the Administrative Office of the Courts, thus greatly impeding the administration of justice. Compounding his lies was the preparation of a fictitious complaint that respondent submitted to his client to mislead him that suit had been instituted.

Conduct comparable to respondent's has merited a lengthier term of suspension. In In re Chidiac, 109 N.J. 84 (1987), the Court held that an indefinite suspension was the appropriate discipline for an attorney who neglected an estate matter, misrepresented its status to a client and, to cover his actions, forged a New Jersey inheritance tax waiver and delivered it to a bank to effectuate a transfer of stock in the bank that the decedent had owned. In In re Yacavino, 100 N.J. 50 (1985), the attorney was suspended for three years for preparing two false court orders for adoption and repeatedly misrepresenting the status

of the adoption proceeding to his clients. In In re Fleischer, 66 N.J. 398 (1975), the attorney falsified a judgment of divorce and presented it to the client, who relied on the document and remarried. The attorney, who was suffering from a personality disorder, was indefinitely suspended from the practice of law. But see In re Kasdan, 115 N.J. 472 (1989).

Testimony was offered, before the ethics committee, on respondent's mental state at the time of his "cover-up" of the truth. Dr. Riccioli, a therapist who had several meetings with respondent, testified that

> [Respondent] could have the mental acuity to hide the truth, but the judgment involved, the knowledge of the wrongfulness of what he was doing I felt was impaired. While he was doing something wrong, I don't think he had the capacity or the wherewithal to really appreciate what was happening. It was almost instinctive behavior, he was trying to survive the best way he knew how, and because of the emotional stress he was under, he was making all sorts of wrong decisions
> [T9/13/90 at 24]

Respondent testified that he did what he did because of the pressure that Kliegman, a difficult client, was placing on him. He explained also that he was embarrassed by his inattention to the case because he and Kliegman shared a social relationship. Respondent testified further that he had informed Kliegman that he did not believe there was merit to the claim Kliegman wanted respondent to pursue. He also did not ask to be paid for handling this matter on Kliegman's behalf.

As to whether Kliegman was harmed by respondent's unethical conduct, the Board has noted that respondent paid Kliegman $75,000 in settlement of his claim. During his closing argument before the

hearing panel, the presenter opined: "In my evaluation of the claim Mr. Kliegman had, I don't think it was a strong one at all. And in essence, the payment (respondent) made of $75,000 was a windfall...."[1] The Board also noted that, although the cases filed in Essex and Passaic counties were viable and Kliegman could have assigned his rights in them to respondent, respondent chose not to pursue the cases in order to put the incident behind him.

Respondent contended before the committee that, although he believes that he could function as a competent attorney without treatment, he planned to continue his treatment with Ms. Kahn (T9/13/90 81). In addition, Dr. Riccioli testified that he found respondent to be at a point where he could resume his practice (T9/13/90 30). Both Eva Maria Kahn, a clinical social worker counseling respondent, and Dr. Frank Riccioli, a psychiatrist who had treated respondent, testified before the committee that the imposition of a proctorship would not be beneficial to respondent. With regard to his future practice, respondent testified that he does discuss difficult legal issues with other attorneys and recognizes the benefit of obtaining another attorney's opinion. In addition, he has determined that, other than in the field of landlord/tenant law, he will not take on cases requiring litigation or cases dealing with areas of law in which he has no experience.

Although respondent's psychological difficulties are not an excuse for his misconduct, such difficulties, if proven to be

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[1]Respondent did not have the money to give to Kliegman and had to borrow it from family members.

causally connected to his actions, have in the past been considered as mitigation. In In re Templeton, 99 N.J. 365 (1985) the Court held:

> In all disciplinary cases, we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently for some credible reason other than professional and personal immorality that could serve to explain, and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment.
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> [Id. at 373-4]

But see In re Tuso, 104 N.J. 59 (1986) (where causation was not demonstrated).

The Board is of the opinion that respondent has proven the causal link between his acts of misconduct and his psychological difficulties resulting from the death of his young daughter and of his mother. Respondent has presented extensive and persuasive mitigating circumstances as follows:

1. Respondent's considerable personal problems, sparked by the tragic death of his young daughter and the serious problems experienced by another daughter.

2. The fact that two therapists agree that he is now functioning well and able to practice law without the occurrence of future incidents. During their testimony, both therapists opined that respondent's misconduct was caused by the tragic events in his

personal life and that his condition is now greatly improved (T9/13/90 18-19, 23, 40, 48).

3. The fact that respondent recognized his problem and sought help therefor.

4. The fact that his therapy is ongoing.

5. The fact that his client was difficult and extremely demanding and that he and respondent had known each other for approximately fifteen years.

6. Respondent's lack of prior misconduct for nearly twenty years, before these unfortunate incidents.

7. The fact that his actions were aberrational and not reflective of a deficiency in character or a pattern of sloppy practices.

8. The fact that his conduct was in no way motivated by personal financial gain.

9. Respondent's candor, admission of wrongdoing and remorse during the ethics proceeding.

Although the Board recognizes the presence of strong mitigating circumstances, the misconduct in this matter is substantial. "Even absent criminal intent, when an attorney perpetrates a fraud upon the court, that conduct poisons the stream of justice and can warrant disbarment." In re Yacavino, 100 N.J. at 54, citing In re Stein, 1 N.J. 228, 237-38 (1949). Respondent's violation of RPC 8.4(d) is troubling, as it appears that respondent perpetuated his misconduct by continuing to build on his initial misrepresentation for several years. However, it further appears

that respondent was caught in a web created by his untruthful statements to his client, from which he was unable to extricate himself due to the close relationship he had with Kliegman.

The Board faced a difficult decision in this matter, torn between its duty to protect the public from an attorney who is guilty of serious unethical conduct and its consideration of extensive mitigating circumstances. The Board is of the opinion that, under existing caselaw the within misconduct would warrant a two-year suspension. However, due to the unusual and compelling circumstances present in this matter, namely, the fact that only one client was involved, respondent's efforts to make the client whole, the death of respondent's daughter and his fears over the health of a second daughter, the Board recommends that all but six months of the suspension be suspended. The Board is convinced that respondent's transgressions are not reflective of a deficiency in character or an insensitivity to either basic ethics considerations or sloppy practices. They are, rather, the result of overwhelming and unique factors that are unlikely to reoccur. Accordingly, there is no need either to educate this respondent further about ethics principles governing the profession or to protect the public from further misdeeds. Additionally, the Board does not believe that a proctorship will be necessary upon the conclusion of the recommended discipline. Three members of the Board dissented from this recommendation. In the dissenters' view, this case presents, in the aggregate, an overwhelming set of mitigating circumstances that calls for a public reprimand only.

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

Dated: 10/3/1991 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board