SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-155

IN THE MATTER OF	:
JOSEPH P. GRABLER,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 17, 1991

Decided: October 3, 1991

Dana C. Argeris appeared on behalf of the District IX Ethics Committee.

Richard C. Swarbrick 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 IX Ethics Committee ("DEC"). Two matters were considered by the committee, as was respondent's failure to cooperate with the DEC investigator.

Respondent was admitted to the New Jersey bar in 1964. At the time of the DEC hearing in the instant matter, respondent had not yet applied for reinstatement from two prior concurrent suspensions, although they had already expired.

COUNTS ONE THROUGH FIVE

In late 1988, grievant, Michelle Balut, retained respondent to handle a closing on the sale of her house in Hazlet, New Jersey, to her daughter and son-in-law who were also represented by respondent in that transaction. In addition, respondent represented Balut in the subsequent purchase of another property in Keyport, New Jersey. Balut expected -- as did her daughter and son-in-law -- that respondent would pay off, among other things, the existing mortgages on the Hazlet property and on the Keyport property, as well as the utility and water bills and the sewer taxes on the Hazlet property. Balut also believed that respondent would procure title insurance on her behalf in connection with the Keyport property.

At the closing on the Hazlet property, on December 13, 1988, it was determined that Balut was entitled to receive approximately $1200. Because the closing ended late on Friday afternoon, she agreed to have a check mailed to her the following Monday. Respondent, however, did not mail the check, as promised. Several weeks after the closing and after a number of telephone calls had been placed to respondent, Balut finally received her check. Around that same time period, near the end of December 1988, Balut received a notice from the Fireman's Fund Mortgage Corporation, informing her that her mortgage payment for the Hazlet property was late and that she was in danger of default and foreclosure. T18[1].

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[1] T denotes the transcript of the December 11, 1990 hearing before the DEC.

Thereafter, Balut contacted respondent on several occasions to ascertain why the mortgage had not been paid off. First, respondent notified Balut that he had been ill. Later, respondent's excuse for not following through was that he had been experiencing personal problems. Despite his excuses to Balut, he still failed to satisfy the existing mortgage.

At the DEC hearing, Balut testified that, subsequently, she had called respondent a few more times. Finally, during a telephone conversation, respondent notified Balut that he had paid off the mortgage. Two weeks later, Balut contacted the mortgage company, only to be informed that the company had still not received the mortgage payment. T19.

Balut's efforts to resolve the problem were to no avail. She, therefore, found it necessary to retain another attorney, Brooks Von Arx, to compel respondent to settle the problems with the outstanding mortgage. Von Arx wrote to respondent on February 22, 1989, seeking an explanation for his failure to pay off the mortgage on the Hazlet property since the December 1988 closing. Von Arx also requested proof that two prior mortgages on the Keyport property had been satisfied and that Balut held the property free and clear of any prior encumbrances. Von Arx requested this information because Balut had not yet received a title policy on the Keyport property reflecting that the prior mortgages had been satisfied. Exhibit G-2. Von Arx telephoned respondent on March 1, 1989. At that time, respondent's license to practice law had been suspended. Von Arx also sent him a second

letter on that date, confirming their conversation. Exhibit G-3. During their discussion, respondent informed Von Arx that the funds to pay off the mortgage would be forwarded that afternoon. Notwithstanding respondent's assurances, on March 19, 1989, a man appeared at Balut's home to inform her that her house would be put up for sheriff's sale. T19. The mortgage was eventually paid off at some point in March, 1989, more than three months after the closing.

Respondent had also failed to satisfy Balut's delinquent utility bills and sewer taxes on the Hazlet property, until Von Arx interceded. Additionally, respondent failed to obtain Balut's title policy in a timely fashion and he failed to secure an adjustment that had been promised Balut for a non-functioning appliance in her new home.

As mentioned above, Gwen Anderson and her husband James, the daughter and son-in-law of Michelle Balut, were also represented by respondent in connection with their purchase of Balut's property in Hazlet, which closing took place on December 13. More than three months later, near the end of March 1989, the Andersons received a photocopy of a letter, addressed to respondent, from Lawyers Title Insurance Corporation. Exhibit G-7. That letter, dated March 29, 1990, notified respondent that payment for the title policy had not yet been made. In light of the problems experienced by Balut, Gwen Anderson immediately contacted Von Arx, instead of dealing directly with respondent. T75. Von Arx wrote two letters to respondent regarding the Andersons' title policy. T75. Respondent failed to

respond to either one and also failed to pay the title premium. Finally, on November 16, 1990, the Andersons were obliged to forward a check to Von Arx to satisfy the premium payment for the title insurance. The Andersons eventually received their title policy on December 10, 1990, one year after their closing.

Respondent's explanation for the excessive delays he engendered in the Balut and Anderson closings was difficult to follow. He stated:

> With respect to the Balut closing two things happened in addition to Christmas and all of that in December of 1988. In December of 1988 there was flu-like, not flu, an upper respiratory infection going through family members of the house and I missed close to three weeks in illness.
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> Also, the mortgage pay off statement did not break down per diem, it was good for the entire month no matter when you paid it. So one of the tapes that I dictated was inadvertently erased and my secretary, whom I thought would be super fine with her friends [sic] closings, didn't get the check out in December . . . .
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> [T115-116]

Respondent explained that he had written for an updated pay-off statement but, because of the amount of time that had elapsed, additional interest had accrued together with other additional costs and attorney's fees. By this time, respondent had already been suspended from the practice of law. Respondent testified that he then sent a check to pay off the mortgage and the additional

costs. He stated: "I said, hey, guys, you know, it's me, I'm paying this out of my own pocket".[2] T116.

With respect to the Anderson matter, respondent claimed that he had no knowledge, until several days before the DEC hearing, that the Andersons had experienced any problems obtaining their title policy. Respondent explained that, although he checked his mail periodically, by March, he had stopped going to his office entirely.

At the DEC hearing, respondent acknowledged that generally monies are disbursed within two days following a closing in a real estate transaction. He explained, however, that, in the Balut transaction, the various disbursements had been delayed "because of a combination of errors." T126. Respondent also acknowledged an overage in his escrow account reflecting monies not disbursed for the Andersons' title policy. T127. He offered to and, in fact, did reimburse the Andersons at the DEC hearing.

Respondent did not accept responsibility for the excessive delays that had occurred. Instead, he proffered a number of excuses, including a one-page evaluation from a psychologist, whom he visited for the first time in December 1990.

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[2] Respondent's testimony failed to indicate the date that he finally paid off the mortgage or exactly which portion of the closing costs he personally paid. He did, however, acknowledge that the mortgage company had informed him that it would foreclose on the property. In fact, Balut testified that someone had approached her regarding a sheriff's sale of the property. Presumably, some additional costs were incurred as the result of the anticipated foreclosure.

The DEC found that respondent had been grossly negligent in handling ordinary residential closings, by failing to attend to simple, post-closing, administrative follow-up matters. The DEC also found that respondent had failed to represent his clients in a prompt and diligent fashion, by ignoring or choosing not to return their telephone calls and failing to keep them informed regarding the status of their matters, in violation of RPC 1.3 and RPC 1.4. In addition, the DEC found that respondent had failed to promptly deliver funds that third persons were entitled to receive, in violation of RPC 1.15.[3] The DEC did not find that respondent had violated RPC 1.16, 5.5 or 8.4, as alleged in counts one through six.

COUNTS SIX AND SEVEN

Respondent was charged with representing a client while his license to practice was suspended by the Court. He had been twice suspended from the practice of law. The suspensions, each for one year, were to run concurrently. The record herein does not establish by clear and convincing evidence that, on June 8, 1990, respondent was aware that the second suspension had been imposed. However, for purposes of this matter, respondent's knowledge of that suspension is irrelevant. His testimony at the DEC hearing

[3] The panel did not pass upon the propriety of respondent's representation of both buyer and seller in the Hazlet transaction. Because the complaint did not charge respondent with a conflict of interest, the Board makes no findings of unethical violations on this score.

established conclusively that, on June 8, 1990, he was aware that his license had not yet been reinstated by the Court, even though the concurrent terms of suspension had already expired and he was eligible to apply for reinstatement. It was on that date that respondent appeared before the Office of Administrative Law (OAL).

A hearing in Division of Motor Vehicle v. Hennessey, OAL Dkt. No. MVH 2780-90, was conducted at the OAL before Administrative Law Judge (ALJ) Gerald T. Foley, Jr. Respondent admitted that he had been present at that hearing. On June 18, 1990, ALJ Foley issued a written decision in the matter. On the face of that decision, respondent was listed as appearing on behalf of Thomas J. Hennessey, Jr., the respondent in the OAL matter. Page two of the decision reads as follows: "At the outset of the hearing, counsel for respondent objected to the October 21, 1989 entry on the certified contract of respondent's driver history record, dated April 4, 1990. "He claimed the entry 'operated under the influence liq/drugs' was hearsay concerning the New York charge." Id. at 2. The next paragraph made reference to stipulations made by "counsel for respondent." On page three, the decision again referred to counsel's objection to Hennessey's driving record, and further stated that "Counsel for respondent contended that, under all the circumstances of the case, petitioner should at least constrain the punishment to the 90 days imposed in New York . . . ." Id. at 3.

Despite respondent's arguments to the contrary, it is clear from the ALJ's written decision that respondent was acting as counsel for Hennessey. Indeed, OAL's Director Jaynee LaVecchia

wrote the following to the Unauthorized Practice of Law Committee on July 5, 1990: "I have been informed by Administrative Law Judge Gerald Foley that Mr. Joseph Grabler appeared before him on June 8, 1990 and represented Mr. Hennessey in the above-referenced matter." (emphasis supplied). Exhibit 8.

Respondent's explanation as to whether he was practicing law while under suspension was, at best, confusing. At the DEC hearing, respondent's attorney requested that the panel stipulate that an individual (non-lawyer) may appear before an administrative law judge under certain circumstances. T137-138. Implicit in that request was that the panel acknowledge that respondent, as a non-lawyer, could represent a party. The relevant rule, however, limits such appearance, on application to the court, R. 1:21-1(e), and only for specific reasons, R. 1:21-1(e) 7. Under no circumstances, however, may such representation be undertaken by a suspended attorney. Indeed, Guideline No. 23, in relevant part, specifically prohibits a suspended attorney from appearing as principal, agent, servant, clerk or employee of another before any tribunal. Additionally, the guideline also explicitly prohibits an attorney from furnishing legal services, giving an opinion as to the law or its application or any advice with relation thereto, from holding that attorney out to the public as being entitled to practice law, or in any manner conveying to the public the impression that that person is authorized to practice law.

Paragraph 11 of the guideline also imposes an affirmative obligation upon a suspended attorney to promptly give notice of the

suspension, by registered or certified mail, return receipt requested, to the clerk of each administrative agency in which a matter is pending.

Respondent testified that he had advised the Hennesseys that he could not do anything to assist Tom Hennessey, Jr., that he had said "I cannot practice law, I'm under suspension or rather I have not yet been reinstated." T168 Respondent did, however, go to court with the Hennesseys and went into the judge's chambers. T170. He claimed he had spoken to the judge at the hearing solely to "expedite the thing." It is clear that he was in violation of Guideline No. 23. At the DEC hearing, he explained:

> I did say to the Judge New York has impaired which we in Jersey do not have and that's what he was found guilty of, but that he got the ticket for impaired in New York, that he pled guilty to it in New York, New York punished him for 90 days, that was all just fact. There was nobody from the state, there was nobody presenting the state's case, there was no lawyering at all by anybody and not by me, I just said, hey, these are the facts. It's an out-of-state conviction and New Jersey should not impose a more strict penalty than the state in which it occurred. . . .
> [T170]

Respondent contended that the only thing that his "presentation" to the judge "did was to speed things up . . . ." T172.

Respondent testified that he knew that he had not been reinstated, as of June 8, 1990, and that he also knew that he did not have to be a lawyer to appear before an administrative law judge. T174. Respondent admitted making an objection based on hearsay, at the OAL hearing. T174-175. When asked whether he had stipulated certain things on behalf of Mr. Hennessey, he replied:

"I don't want to hedge. My inclination is to tell you yes, but stipulated, I don't remember those words being used. These were the uncontroverted facts." T175. Finally, respondent admitted discussing a restriction of the penalty to be imposed for Hennessey's violation. T176.

Respondent's argument in the alternative, i.e., that one does not have to be an attorney to appear before the OAL and that he was not acting in a representative capacity in the Hennessey matter, is mutually exclusive and non-persuasive. The DEC, therefore, properly found that respondent did represent Thomas J. Hennessey, Jr. at an OAL proceeding while under suspension, in violation of RPC 1.16(a)(1), RPC 5.5 and RPC 8.4(d). As explicitly required by Guideline No. 23, respondent was under an affirmative obligation to clearly advise ALJ Foley that he was still suspended from the practice of law and, hence, that he could not assist Hennessey before the court, in any capacity.

FAILURE TO COOPERATE WITH THE DISCIPLINARY AUTHORITIES

Respondent was charged with failing to cooperate with the DEC investigator, in violation of RPC 8.1(b). On July 17, 1990, the investigator forwarded respondent a letter, requesting him to reply to the grievances that had been filed against him. On August 1, 1990, the investigator forwarded a second letter to respondent, at his home. On August 6, 1990, respondent notified the investigator that he had received the August 1 letter, that he would be retaining Richard Swarbrick, Esq. as his attorney and that either

Swarbrick or he would be in touch with the investigator by the end of that week. On August 17, 1990, the investigator sent a third letter to respondent's home, confirming their earlier conversation and notifying him that a response to the grievances was required by August 24, 1990. Not having received a reply from either respondent or his attorney and as a final courtesy, the investigator telephoned respondent and again extended the time for him to file a response to September 5, 1990. Respondent assured the investigator that Swarbrick would be contacting him. T8. Neither Swarbrick nor respondent ever contacted the investigator.

Thereafter, by letter dated October 30, 1990, the formal complaint was forwarded to respondent. Respondent did not file an answer. The DEC properly found that respondent's conduct had clearly and convincingly showed a failure to cooperate with the ethics proceedings, in violation of RPC 8.1(b).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the DEC in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. The Board also finds that respondent's conduct violated RPC 8.4(c), in addition to the disciplinary rules cited by the DEC.

The record herein establishes by clear and convincing evidence that respondent failed to complete his responsibilities in

connection with two real estate transactions. Respondent failed to pay off Balut's mortgage for a period of three months and only did so after repeated requests by Balut and by her lawyer. Balut was even threatened with a foreclosure action before respondent finally acted. Respondent similarly delayed paying off the utility bills and sewer taxes, delayed obtaining Balut's title policy and completely failed to obtain an adjustment for a non-functioning appliance, to which Balut was entitled.

With respect to the Anderson matter, respondent failed to obtain their title policy with funds specifically escrowed for that purpose. The Andersons were forced to pay additional sums for their title policy, for which they were not reimbursed until the DEC hearing. It took the Andersons an entire year after the closing to obtain their title policy.

Respondent's excuse for failing to conclude these matters was first an illness, next personal problems and finally his preoccupation with winding down his law practice because his license had been suspended. Clearly, respondent's inaction rose to a level of gross neglect. He also failed to act with reasonable diligence and promptness, failed to comply with reasonable requests for information and failed to promptly deliver funds to third persons. As noted above, the DEC did not find that respondent had violated RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation). However, Balut testified that respondent had informed her that her mortgage had been paid off when, in fact, it had not. Respondent failed to rebut this testimony. The Board,

thus, finds that he misrepresented the status of the matter to Balut, in violation of RPC 8.4(c).

Respondent's neglect in handling the Balut and Anderson matters was inexcusable. Had these violations been the sole basis for the imposition of a sanction, his inaction would clearly merit a public reprimand. For example, in In re Mahoney, 120 N.J. 155 (1990), a public reprimand and a one-year proctorship were imposed where an attorney failed to make timely efforts to obtain the discharge of a mortgage, prepared an irregular discharge unacceptable for filing and subsequently misrepresented that another discharge of the mortgage had been sent to the clerk for recording. In addition, the attorney failed to conclude a different real estate transaction for two years and failed to respond to numerous inquiries from his clients about the status of their matters.

Similarly, a public reprimand was imposed in In re Halpern, 117 N.J. 678 (1989). In that matter, the attorney was found guilty of gross neglect, for failing to remit real estate proceeds to satisfy an existing mortgage on purchased property. A demand audit of the attorney's books and records also revealed that his accounting practices were deficient. Of course, the level of discipline imposed therein, a public reprimand, presupposed a clear disciplinary record.

Here, however, respondent was also charged with a most serious violation: practicing law while suspended. From the evidence in the record, it is clear that respondent appeared at the OAL on June

8, 1990, knowing that his license to practice law had not been reinstated. ALJ Foley's initial decision repeatedly refers to respondent as counsel for Thomas Hennessey, Jr. The conclusion is inescapable that respondent failed to inform the ALJ that he was not appearing as counsel for Hennessey on that date. Moreover, respondent admitted that he also failed to inform the ALJ that his license had been suspended. As a result, respondent breached his affirmative duty to notify the judge of his suspension, as set forth in Guideline No. 23. Subsequent to the OAL hearing, ALJ Foley notified his director that respondent "appeared before him on June 8, 1990 and represented Mr. Hennessey . . . ." ALJ Foley was concerned because he had learned that respondent was suspended from the practice of law at the time of his appearance.

During the DEC hearing, respondent's attorney repeatedly asserted that the OAL hearing transcript would prove that respondent did not appear as an attorney before the ALJ. The DEC, therefore, afforded respondent's attorney an opportunity to submit excerpts from the administrative hearing with his post-hearing brief, to make such a showing. Respondent's attorney, however, failed to avail himself of the opportunity to present any such evidence.

There remains the issue of appropriate discipline. In In re Goldstein, 97 N.J. 545 (1984), an attorney violated the agreement he had reached with the district ethics committee and this Board to limit his practice to criminal matters. The attorney was, therefore, temporarily suspended from the practice of law.

Notwithstanding his suspension, the attorney continued to advise clients that he was working on their cases. In addition to the foregoing violations, the Court also reviewed eleven individual matters. In each matter, the Court found that the attorney had failed to carry out contracts of employment, had failed to act competently and had also misrepresented the status of each matter. The Court found that the eleven matters presented a disturbing pattern of gross negligence. The attorney's deficiencies were chronic and persistent. The neglect was aggravated by the attorney's violation of an agreement and subsequent misrepresentations to clients that he was still working on their cases, notwithstanding his suspension. Under the totality of the circumstances, the Court felt constrained to disbar the attorney.

Clearly, the gross neglect in the instant matters does not evidence a pattern, as in Goldstein. The neglect herein related to two matters during a time when respondent faced imminent suspension from the practice of law. Nevertheless, his inaction cannot be tolerated. In addition, he misrepresented to Balut that the mortgage had been paid off, when he knew it to be otherwise. His most serious transgression, however, was to represent a client before the Office of Administrative Law, while under suspension. The above unethical conduct was aggravated by respondent's failure to cooperate with the ethics investigator and to file an answer to the formal complaint. The Court has repeatedly warned the members of the bar that "[a]n ethics complaint should be considered - as it certainly is by the vast majority of all practicing attorneys - as

entitled to a priority over any matter that the lawyer may have in hand that can possibly be postponed." In re Kern, 68 N.J. 325, 326 (1975).

Furthermore, respondent's conduct in the instant case must be viewed in conjunction with the serious nature of his past disciplinary history. In five prior, separate matters, respondent, among other things, misled clients, over the course of several years, to believe he had instituted actions on their behalf when he had not; he neglected matters for years; he ignored calls and letters from his clients and subsequently ignored the attorneys they were required to retain to compel respondent to act; he withheld funds from clients and he failed to conduct ordinary administrative functions. In re Grabler, 119 N.J. 83 (1990); 114 N.J. 1 (1989).

The Board took into consideration the psychological pressure under which respondent had been operating at or about the time of his misconduct. As his counsel explained to the Board, respondent was nearing the date of his suspension. He was severely depressed and, as a result, was uncertain as to what he could or could not do, as to what constituted a ministerial act, as opposed to practicing law. Respondent's depression was so severe that he dealt with his problems by avoiding them. Respondent's counsel also stressed the fact that respondent was a sole practitioner and that the everyday business of practicing law creates tremendous mental strain. In addition, counsel presented for the Board's consideration an evaluation prepared by respondent's psychologist.

The report indicated that respondent suffered from diabetes and depression and that he required professional intervention for both problems. The doctor further indicated that respondent was "probably suffering from residuals of avoidant behavior." He opined that respondent "would function most efficiently in a structured situation legal or otherwise. . . ."

Respondent's attorney informed the Board that respondent's problems began when he started practicing law on his own; that he probably should not have been in sole practice and that he suffered from depression, refused to admit it and therefore refused to do anything about it. The attorney also noted that respondent's depression was exacerbated by his inability to practice law as a result of his earlier suspensions and further aggravated by the recent death of his mother.

In conclusion, the attorney indicated that he felt respondent was not capable of practicing law at that time; that, as his doctor recommended, he should undergo psychological treatment; and that, when cleared, he should return to the practice of law, not on his own but, rather, in a structured environment.

The Board is mindful of the fact that the purpose of discipline is not the punishment of the offender but "protection of the public against an attorney who cannot or will not measure up to the high standards of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the

ethical infraction in light of all the relevant circumstances. In re Nighosian, 87 N.J, 308, 315 (1982). Mitigating as well as aggravating factors are, therefore, relevant for consideration. In re Hughes, 90 N.J. 32, 36 (1982); In re Vincenti, 114 N.J., 275, 285 (1989).

The Board was particularly troubled by the fact that respondent's prior disciplinary infractions bear a marked similarity to the instant violations. In mitigation, however, the Board has considered that, apparently, respondent began suffering from depression at or about the time he started his sole practice. Problems with his practice began around that time as well. His mental state appeared to worsen with each problem he faced in both his personal and his professional life. Accordingly, after weighing the aggravating and mitigating circumstances present in this matter, the Board recommends that respondent be suspended from the practice of law for an additional two-year period. At the expiration of the term of the suspension, respondent should be placed on disability inactive status until he is able to prove his fitness to practice law. The Board further recommends that, upon his reinstatement, respondent be required to practice law under the supervision of a proctor for a period of two years.

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

Date: 10/3/1991

By: Raymond R. Trombadore
Chair
Disciplinary Review Board