

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 00-101

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IN THE MATTER OF  
MARC D'ARIENZO  
AN ATTORNEY AT LAW

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Decision

Argued: June 15, 2000

Decided: November 27, 2000

Scott Geldhauser appeared on behalf of the District IIIA Ethics Committee.

Respondent appeared pro se.

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

This matter was before us based on a recommendation for discipline filed by the District IIIA Ethics Committee ("DEC"). The two-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 7.3 (b)(4) (prohibition against personal contact with prospective clients) (more properly, RPC 7.3(b)(5)) (count one).

Count two charged respondent with violations of RPC 1.15(d) (recordkeeping violations) and RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1993. At the relevant times he maintained an office in Wall, New Jersey. He currently practices in Summit, New Jersey. In 1999, respondent received a three-month suspension for violations of RPC 3.3(a)(1) (false statements of fact or law to a tribunal) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In re D'Arienzo, 157 N.J. 32 (1999).

James Newman, a municipal court judge before whom respondent frequently appeared, referred this matter to the disciplinary authorities. The judge had observed respondent in his courtroom for approximately one year prior to the incident giving rise to his referral. Judge Newman noticed that, in some instances, after a defendant was arraigned, respondent left the courtroom at the same time as the defendant and later returned as that defendant's attorney. The judge, thus, formed the impression that respondent was "trolling" for or soliciting clients in his courtroom. The judge noted that respondent seemed to have "a larger volume than usual of defendants. He could have two or three on in one particular day." Judge Newman testified that, at the monthly meetings of the Monmouth County Judges' Association, other judges had expressed similar concerns about respondent's conduct.

On one occasion, Judge Newman asked the prosecutor to observe respondent after an arraignment. Judge Newman testified that, after the prosecutor followed respondent out of the courtroom, he reported back that he had seen respondent talking to defendants who had been previously arraigned before the judge. Thereafter, the judge summoned respondent and the prosecutor to his chambers and told respondent that he believed that he was soliciting clients in his courtroom. Judge Newman also told respondent that other municipal court judges were forming the same impression. The judge testified that, when he warned respondent to stop soliciting clients, respondent replied that he was being singled out. For a time afterwards, the judge observed that the behavior seemed to stop; respondent did not appear in his courtroom for approximately two months. When respondent returned to Judge Newman's courtroom, however, the judge observed him engaging in the same conduct.

The matter that involved defendant Scott Angus occurred after the judge's conversation with respondent. Angus had been charged previously in different townships with various motor vehicle violations. Angus' license had, in fact, been suspended in 1985 and had not been restored as of the date of his latest appearance before Judge Newman. He had also been convicted of driving while intoxicated ("DWI") on at least two prior occasions. Angus was a multiple offender facing jail time.

Respondent represented Angus in connection with his latest motor vehicle problems. Apparently, Angus had been charged with driving without insurance, driving without a license and possession of a controlled dangerous substance. Judge Newman believed that

respondent had solicited Angus as a client. The judge also felt that respondent's representation of Angus was less than adequate.

Respondent had entered his appearance in Angus' behalf by letter to the court dated March 19, 1998. Prior thereto, Angus had appeared before Judge Newman in the same matter in September 1997 and December 1997. The matter, however, had been adjourned each time, at least once to allow Angus to obtain counsel. On May 5, 1998, respondent appeared before the court with Angus. When respondent could not obtain another adjournment, he was able to "work out" a plea agreement with the prosecutor. Angus entered a guilty plea to driving with a suspended license. The failure to maintain insurance charge was dismissed. As noted above, Angus had been convicted of similar charges before, had two prior DWI convictions and had failed to pay court costs. Angus was, thus, facing enhanced penalties, including additional jail time and increased fines.

During the court proceeding on May 5, 1998, an issue arose as to whether Angus had completed a "countermeasures" program given by the Intoxicated Driver Resource Center ("the IDRC program"). If Angus had completed the IDRC program, he faced only a ten-day suspension on one of the charges; otherwise he would face a thirty-day jail sentence on that charge. Respondent also argued that Angus should not be subjected to enhanced penalties for other reasons and reserved the right to file a brief to bolster his position.

During the proceedings, the judge imposed a conditional sentence on Angus, but gave respondent one week to prove that Angus had complied with the IDRC program. If he were

able to do so, Angus' jail sentence would be reduced. While respondent was given the opportunity to argue for a reduced sentence, he was not required to appear the following week, on May 12, 1998.

Thereafter, respondent requested that the director of the IDRC program write a letter about Angus' compliance with the program requirements. The letter, however, showed that he had not complied.

On May 12, 1998, respondent did not appear at Angus' sentencing. The judge imposed only a thirty-day sentence, rather than the maximum ninety days permitted by statute. Angus' license was suspended for an additional year and he was ordered to pay \$1,500 in fines.

During the court proceedings, Angus indicated that he felt he had been "misrepresented" by respondent. Thereafter, Judge Newman asked him how he had obtained respondent's services. Angus replied that, when he had been before the court in Freehold, respondent was there and mentioned to him that he would like to try to help him out. Thereafter, the following exchange occurred:

THE COURT:           When he was there, did you go to him and say are you an attorney, can you help me or did he come up to you and say I can help you, I'm an attorney?

MR. ANGUS:           That's correct, the second one. He came up to me. . .

\* \* \*

MR. ANGUS: And I feel that last week when I'm here and you two are screaming at each other that by no means it is benefitting me.

THE COURT: It didn't result in anything more to you, I have my separate thing to do with him and you have just confirmed by [sic] suspicions that he is soliciting business in the back of the courtroom which is a violation of the ethics rules which I will deal with.

MR. ANGUS: I am unaware of that.

THE COURT: Well, no it's, no it's one thing if you came to him and said are you an attorney, can you help me, that's fine, but if he came up to you and he solicited the conversation by stating I'm an attorney - -

MR. ANGUS: Right. He came up to me.

[Exhibit 16 at 13-15]

When Angus blamed respondent for the harshness of the sanction imposed, Judge Newman explained to him that no other attorney could have helped him. He was "stuck" by his own record and unfortunately had "created [his] own monster."

In his behalf, respondent tried to discredit Angus' testimony. He claimed that Angus was mistaken about when they had first met. Respondent claimed that Angus had no reason to remember what had happened at the time. On the other hand, respondent claimed that his

recollection of what occurred was "crystal clear." He denied soliciting Angus. Respondent claimed that he was sitting in the courtroom two seats away from Angus, waiting for another one of his clients to be called before the court; it was then that Angus asked him if he was an attorney. Respondent testified that they started talking about his case, and

went through the fact that he had been driving on the revoked list, he had a drug case there, and was looking at jail time.

Then he asked me about it. Then he said, hey, well, you know, I want to find out, is there anything I could do? I was more than happy to talk to him.

[T197]

According to Judge Newman, respondent's representation of Angus was less than adequate, considering the severity of the charges against him. Respondent appeared in court on May 5, 1998 without a file, carrying only a legal pad. The judge also believed that, because of the magnitude of the charges, it was imperative for respondent to obtain discovery, which he failed to do, and that it was standard practice for an attorney to be present with his client throughout all of the proceedings. In fact, Judge Newman declared that he never had defendants appear at sentencing to argue in their own behalf, when they were represented by counsel.

Respondent admitted that he did not order discovery in connection with the matter and acknowledged that such failure was improper. He believed that it was of no consequence in this case, however, because he had recently represented Angus on the same charges in a different court. He, therefore, used the discovery from the earlier matter. Respondent also suggested that there was no issue of whether Angus had received proper notice of his license

suspension. Respondent stated that, because of Angus' prior convictions for driving while on the revoked list, he was aware of his license suspension and was not prejudiced by the lack of discovery.

Ultimately, respondent admitted that there was a question as to whether he should have appeared at the second sentencing date, but claimed that the judge did not require him to appear. He argued that he had adequately represented his client by obtaining a plea agreement that reduced Angus' jail time. Respondent underscored the fact that, in seventy percent of similar cases before Judge Newman, the judge had imposed greater sentences than that received by Angus. Respondent also claimed that, even though the letter from the director of the IDRC program did not confirm that Angus had completed the IDRC program, respondent could not have presented any additional arguments to persuade the judge to further reduce Angus' sentence; the sentence had already been determined at the May 5, 1998 proceeding. Respondent, thus, concluded that his appearance was unnecessary and that the results he achieved for Angus were "borderline outstanding." Respondent's brief at 2.

Respondent admitted that he failed to comply with the recordkeeping provisions of R. 1:21-6. He testified that he did not use a trust account in his practice, which was almost entirely comprised of criminal work. He, therefore, did not maintain any of the required receipts and disbursements journals or client ledger cards.

The complaint also charged respondent with a violation of RPC 8.1(b) for his failure to turn over to the Office of Attorney Ethics ("OAE") records that had been requested.



Instead, respondent submitted to the OAE computer printouts that did not bear the name of any banking institution. The OAE's Assistant Chief of Investigations testified that respondent produced starter checks for his attorney trust account from the Midlantic Bank, in lieu of current attorney trust account checks. Moreover, the starter checks bore an account number that did not correspond with any other documents provided by respondent. Thus, the investigator claimed, respondent had failed to cooperate with the OAE's request for information. It appeared to the investigator that respondent provided the checks only to try to satisfy her that he had complied with her request for his trust account records.

For his part, respondent stated that he had initially opened a trust account with Midlantic Bank. Subsequently, the bank merged with PNC Bank, which assigned a new account number to his attorney trust account. Respondent did not order new checks from the bank, because he did not use his attorney trust account. He, therefore, could not provide the OAE with records he did not maintain.

According to respondent, after his meeting with the investigator, he tried to bring his records into compliance with R.1:21-6. As of the DEC hearing, no further review had been undertaken to determine whether his efforts were successful.

\* \* \*

Based on the record before it, the DEC concluded that respondent had solicited business from Angus, but could not determine the specific date on which the solicitation had occurred. RPC 7.3(b)(5). The DEC did not find a violation of RPC 1.1(a), but found a lack of diligence in respondent's representation of Angus. The DEC concluded that respondent should have ordered discovery on the charges against Angus, should have had a file with him when he appeared in court on May 5, 1998 and should have appeared in court with his client on May 12, 1998, even though Judge Newman had not required his appearance. The DEC also found a violation of RPC 1.15(d) for respondent's admitted recordkeeping violations. The DEC did not find a violation of RPC 8.1(b), because respondent did not maintain the records sought by the OAE and, therefore, could not have turned them over.

The DEC recommended a six-month suspension.

\* \* \*

Following a de novo review of the record, we are satisfied that there is clear and convincing evidence of respondent's unethical conduct.

The DEC properly found that respondent's conduct did not amount to gross neglect. True, under normal circumstances respondent should have requested discovery. Here, however, there is no evidence that it would have helped Angus in any way, in light of the judge's comment that nothing or no one could have helped him more. In addition, it would

be unfair to find that respondent's non-appearance on sentencing day was gross neglect, since the judge had not required him to appear on that day. Accordingly, we do not find gross neglect or even lack of diligence, since there are no allegations that respondent did not act promptly or expeditiously.

Respondent admitted that he did not properly maintain records required by R.1:20-6. He explained that, because he did not use his trust account, he did not believe that he was required to maintain receipt and disbursement journals and client ledger cards or perform three-way trust reconciliations. After the start of the OAE investigation, he learned otherwise. Respondent's recordkeeping was deficient and in violation of RPC 1.15(d). Respondent made an attempt to bring his records into compliance, based on the information given to him by the OAE investigator. The investigator was unable to determine, when respondent presented her with documents at the DEC hearing, whether his records are now in full compliance with the recordkeeping requirements.

The DEC also properly found that respondent did not fail to cooperate with the OAE. Indeed, respondent could not have produced documents or records that he did not have. We, therefore, dismissed the charge of a violation of RPC 8.1(b).

The most troubling charge in this case is that of a violation of RPC 7.3(b)(5). That section states as follows, in relevant part:

- (a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact . . . a prospective client for the purpose of obtaining professional employment if:

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule [mass-disaster events] when such contact has pecuniary gain as a significant motive.

Judge Newman testified that he had developed a belief, after observing respondent for over a one-year period, that respondent was soliciting clients in his courtroom. The judge had no direct knowledge of any specific solicitation. However, he saw respondent leave after defendants had been arraigned, only to return as their counsel. On one occasion, Judge Newman's prosecutor followed respondent out of the courtroom after an arraignment, and saw him talking to defendants who had just been arraigned. The prosecutor, however, did not testify at the DEC hearing. Therefore, the only proof that respondent solicited Angus' representation is Angus' testimony before Judge Newman.

Respondent vehemently denied soliciting clients. He, in fact, went to great lengths to dispel the notion that he solicited Angus by ordering three court transcripts to prove which days he was present in court and how he, thus, could not have been present on the date Angus claimed he was approached by him. Respondent further claimed that it was Angus who approached him for legal advice, not the other way around.

We do not find that Angus' testimony rises to the standard of clear and convincing evidence. We are, therefore, unable to find that respondent solicited the representation.

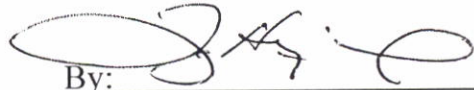
Likewise, we found no evidence presented to establish that respondent customarily solicited clients. We, therefore, dismissed the charge of a violation of RPC 7.3(b)(5).

For respondent's only violation of RPC 1.15(d) (recordkeeping requirements), we unanimously determined to impose an admonition. See In the Matter of Nedum C. Ejiogu, DRB Docket No. 99-070 (December 28, 1999) (admonition for recordkeeping violations) and In the Matter of Bette R. Grayson, DRB Docket No. 97-338 (May 27, 1998) (admonition for recordkeeping violations).

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

Dated:

11/27/00



By: \_\_\_\_\_

LEE M. HYMERLING  
Chair  
Disciplinary Review Board

**SUPREME COURT OF NEW JERSEY**

**DISCIPLINARY REVIEW BOARD  
VOTING RECORD**

**In the Matter of Marc D'Arienzo  
Docket No. DRB 00-101**

**Argued: June 15, 2000**

**Decided: November 27, 2000**

**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			
<b>Total:</b>				9			

*Robyn M. Hill 3/1/01*  
Robyn M. Hill  
Chief Counsel