

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-167

IN THE MATTER OF :
SUSAN DINICOLA-TAPIA :
AN ATTORNEY AT LAW :

Decision

Argued: June 11, 1998

Decided: December 11, 1998

Sharon Rivenson Mark appeared on behalf of the District VI Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter was before the Board based on a recommendation for discipline filed by the District VI Ethics Committee ("DEC").

The complaint alleged violations of RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4 (failure to communicate); RPC 1.15(b) (failure to promptly deliver funds to a client or third person); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and RPC 8.1(b) (failure to cooperate with an ethics investigation).

Respondent was admitted to the New Jersey bar in 1988 and maintains a law office in North Bergen, New Jersey. She was privately reprimanded in October 1993 for failure to communicate with a client. In March 1998, an agreement in lieu of discipline was implemented in two matters. In one of the matters, respondent admitted violating RPC 1.3 (lack of diligence) and RPC 1.15 (failure to safekeep property). In the second matter, she admitted violating RPC 1.3 and RPC 1.4 (failure to communicate with the client).

On August 19, 1994, respondent represented Yolanda Cuadra in the refinance of Cuadra's mortgage on property located in Livingston, New Jersey. Because Livingston had not set its new tax rate as of the closing date, the mortgagee required that respondent hold \$1,041.60 in escrow for the third quarter 1994 taxes.

According to respondent, Cuadra was to send respondent a copy of the new tax bill when Cuadra received it. By letters dated September 20, 1994 and November 9, 1994, respondent reminded Cuadra that she was holding the money in escrow and was waiting for the tax bill before sending the payment to Livingston. On December 7, 1994, respondent sent a letter to Cuadra asking Cuadra to contact her office. Those letters were sent to Cuadra at the Livingston property address. However, Cuadra resided in West Orange and rented out the Livingston house.

Cuadra testified that she did not receive those letters even though her tenants ordinarily would give her all mail addressed to her and delivered to Livingston. Cuadra also testified that, at the closing, she did not understand that respondent would be holding money in escrow for taxes and that she had to send a copy of the third quarter 1994 tax bill to respondent. According to Cuadra, it was not until the mortgagee contacted her in 1996 that she realized that money from the closing had been placed in escrow.

By letters dated March 26, 1996, the mortgagee advised both Cuadra and respondent that third quarter 1994 taxes still had not been paid and that its numerous attempts to contact respondent since January 1996 had been unsuccessful. The mortgagee further advised them that the property had been listed for a tax sale. In its letter to respondent, the mortgagee requested that she contact the Livingston tax office to ascertain the amount due and to issue payment from the escrow funds. The mortgagee informed respondent that she should absorb all accrued penalties and interest. Finally, the mortgagee requested that respondent provide copies of the tax payment receipt to both the mortgagee and Cuadra.

On April 2, 1996, respondent discussed the problem with the mortgagee. In a letter to the mortgagee, respondent confirmed that she would review her file and respond to the mortgagee's requests. Respondent disputed, however, that the mortgagee had made numerous attempts to contact her.

Cuadra also attempted to contact respondent after receiving the mortgagee's letter. Respondent admitted that she did not return Cuadra's telephone calls. Her explanation was that

someone in her office scheduled an appointment for Cuadra to meet with her in June 1996 and Cuadra had not kept the appointment. Cuadra, in turn, testified that she did not receive any response to her telephone calls.

By letter dated April 17, 1996, Richard M. Cignarella, Esq. advised respondent that he represented Cuadra and requested that she communicate with him regarding her failure to pay the taxes. He also stated that he believed that respondent had overcharged Cuadra for certain closing expenses. When Cignarella did not receive a reply from respondent, he telephoned her at least three times but never received a return call. On behalf of Cuadra, Cignarella filed a grievance against respondent on May 16, 1996.

On May 21, 1996, respondent "faxed" a letter to Cignarella stating that she had reviewed her file and that the escrow funds had been paid to Cuadra. She promised to send him, within the week, the canceled check showing the payment to Cuadra. By letter dated May 28, 1996, Cignarella reminded respondent that there were additional issues that she had not addressed. However, Cignarella received nothing further from respondent.

Ultimately, the mortgagee paid the delinquent taxes and added that amount to Cuadra's monthly mortgage payments. The record does not indicate when this was done or the amount paid to Livingston.

The grievance was served on respondent by letter dated November 12, 1996.¹ Because the DEC investigator received no response, he sent a second letter on December 3, 1996.

¹ There was a delay in serving the grievance because the DEC initially declined to docket it, viewing it as a fee dispute. However, Cuadra requested that the matter be treated as an ethics grievance and waived any adjustment of legal fees.

A third letter was "faxed" to respondent on January 2, 1997. Respondent replied, on that same day, stating that the file had been in storage with her closed files, that she had retrieved the file and that she would respond by January 6, 1997.

By letter dated January 14, 1997, respondent advised the investigator that she had reviewed her file and discovered the source of her "confusion." She requested that the investigator contact her to discuss the matter in detail. The investigator replied by letter of February 5, 1997, requesting that respondent provide an explanation in writing. Because he did not receive anything from respondent, the investigator wrote to her again on February 12, 1997.

On February 20, 1997, respondent advised the investigator that, after reviewing her file, she discovered that she had the \$1,041.60 in her trust account after all. She enclosed with the letter a trust account check payable to Cuadra. Respondent claimed that the delay in replying to the investigator's inquiries was primarily due to the fact that the file was in storage.

At the ethics hearing, respondent testified that the file was closed in December 1994 because Cuadra did not respond to her letters. Respondent added that it was not until she received the March 1996 letter from the mortgagee that the issue of the escrow was again brought to her attention. According to respondent, after she received the letter, she reviewed the closed file. At that time, she thought that the \$1,041.60 tax escrow had been released to Cuadra because Cuadra had received a check for \$1,451.34 from the closing proceeds.

According to respondent, the file was inadvertently marked "closed" again in June 1996; it was not until she was served with the grievance in November 1996 that she again looked for the file. Respondent added that, although her tracking system indicated the file was closed, it had

been misfiled with the active personal injury matters. It was in January 1997, respondent testified, when she again reviewed the file and her canceled trust account checks, that she realized that she still had the tax escrow in her trust account.

In her defense, respondent testified that, in January 1997, her mother had undergone surgery for bladder cancer. According to respondent, it was her mother's nineteenth operation for the cancer. After the January 1997 operation, she had to care for her mother and take her for chemotherapy treatments. In addition, respondent claimed, during a family vacation in the Dominican Republic in June 1997, their passports had been stolen. As a result, they had been unable to return to the United States until July 27, 1997.

* * *

The DEC found violations of RPC 1.3, RPC 1.4 and RPC 8.1(b). It declined to find that respondent violated RPC 1.1(a) or RPC 1.15. Also, the DEC determined that respondent had not intentionally overcharged Cuadra for closing expenses in an attempt to defraud her, in violation of RPC 8.4(c). However, the DEC did find that there were overcharges and that those monies should be refunded to Cuadra.

The DEC recommended that respondent be reprimanded and that she be required to attend a course on office management. The DEC also recommended an audit of respondent's accounts.

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

There is ample evidence of a lack of diligence by respondent beginning in December 1994, when she closed the file, even though she held funds in her trust account for property taxes. Respondent's explanation that the file was closed because Cuadra had not responded to her September, November and December 1994 letters is unreasonable. Until the final disposition of the escrow, the file should have remained open. Respondent's conduct, thus, violated RPC 1.3.

Although not found by the DEC, there is also clear and convincing evidence of gross neglect by respondent. Respondent failed to take any action to pay the taxes from December 1994 to March 1996. Even after the mortgagee notified her that the property had been listed for tax sale because the third quarter 1994 taxes had not been paid, respondent failed to act. Respondent had a fiduciary duty not only to Cuadra, but also to the mortgagee, as its approved closing attorney. Accordingly, it was her obligation to pay the outstanding taxes out of the escrowed funds.

Indeed, in its March 1996 letter, the mortgagee requested that respondent contact the Livingston tax office to ascertain the current amount due and to make the required payment. Respondent promised the mortgagee that she would review her file and reply to the mortgagee's

concerns. However, the only action that respondent took was to have her secretary schedule an appointment with Cuadra for June 1996. When Cuadra did not keep the appointment, respondent did nothing to discharge her obligation under the escrow agreement, although aware that the taxes remained outstanding and that serious consequences could follow, such as a tax foreclosure. Respondent's failure to act constituted gross negligence, in violation of RPC 1.1(a).

With regard to the alleged violation of RPC 1.4, respondent admitted that she did not return several telephone calls from Cuadra in March and April 1996. Furthermore, respondent failed to reply to the letters from Cuadra's attorney, except for one letter that incorrectly stated that the escrow funds had been turned over to Cuadra. In that letter, respondent promised to send the canceled check to Cignarella, but did not do so. In light of the foregoing, there is clear and convincing evidence of respondent's failure to communicate with her client.

The Board declined to find a violation of RPC 8.1(b). Although respondent's initial response to the grievance was untimely, she did reply ultimately and expressed her willingness to cooperate with the investigation. Respondent also answered the complaint and participated in the DEC hearing. For those reasons, the Board dismissed the charge that respondent failed to cooperate with the ethics investigation.

With regard to the allegation that respondent violated RPC 8.4(c), the DEC properly found that the excess charges for closing expenses did not rise to the level of dishonest or fraudulent conduct. The Board agreed with the DEC that respondent should refund the excess charges in the amount of \$245 to Cuadra.

As to the charge of a violation of RPC 1.15(b), the DEC concluded that respondent's failure to pay the taxes from the escrow was caused by oversight, rather than wilful conduct. The finding does not take into account an attorney's affirmative obligations to fulfill the terms of an escrow agreement. However, as explained below, the Board made no findings, at this time, in this regard. The Board was disturbed by respondent's inaction in this context, as well as by respondent's position that, when she initially reviewed the file after receiving the mortgagee's March 1996 letter, she believed that she had paid the \$1,041.60 tax escrow to Cuadra because there was a check to Cuadra in the amount of \$1,451.34 from the closing proceeds. First, such disbursement of the funds would have been in violation of the mortgagee's instructions. Second, the RESPA specifically stated that there was to be a tax escrow held by respondent. Third, respondent sent a letter to the mortgagee on August 19, 1994 confirming that she was holding \$1,041.60 in her trust account for the taxes. Fourth, the \$1,451.34 check to Cuadra was dated August 23, 1994 and respondent's September 20, 1994 letter to Cuadra stated that she was still holding the tax escrow. Fifth, respondent's trust account reconciliations should have revealed the escrow. For some unexplained reason, respondent incorrectly zeroed out her trust ledger sheet for the closing. However, even if she had reviewed her trust ledger sheet only², she should have been alerted to the trust escrow, since the ledger sheet stated "hold escrow of 1,041.60 3rd quar. taxes" on the line in which that amount is deducted from the balance.

² In her May 21, 1996 letter to Cignarella, respondent stated that she had reviewed her file, not just her ledger sheet. Her certification also stated that she had reviewed the file.

As mentioned above, however, the Board made no findings on the alleged violation of RPC 1.15, at this time, because the Board is hereby directing the Office of Attorney Ethics (“OAE”) to audit respondent’s accounts. The Board is concerned that there was no evidence adduced at the hearing from which the Board could determine if the escrow funds remained intact in respondent’s trust account. If the funds were in respondent’s trust account and if she were reconciling her trust account records, as required by R.1:21-6, she would know that she had an open escrow balance from this refinancing. Yet respondent was allegedly unaware, from December 1994 until January 1997, that there was such an open balance. The audit should reveal whether respondent is complying with R. 1:21-6 and whether the escrow funds remained untouched in respondent’s trust account. Because of the audit, the Board does not make a finding as to whether respondent violated RPC 1.15.

Equally troubling was respondent’s refusal to take any responsibility for her failure to pay the taxes. In her pleadings and in her testimony, respondent blamed Cuadra for her failure to properly disburse the escrow funds. Respondent took the unreasonable position that, because she had approximately one thousand open files in her office, Cuadra should have taken the responsibility for “keeping on top of things.” Moreover, respondent expressed no regret for her misconduct.

As to the mitigation advanced, respondent offered no explanation for her inaction prior to January 1997. Although she testified that the January 1997 surgery was her mother’s

nineteenth operation, there is no evidence as to the dates of the earlier surgeries or as to her mother's condition prior to January 1997.

For respondent's violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a), the Board unanimously determined to impose a reprimand. See In re Cabelo, 122 N.J. 295 (1991) (public reprimand for failure to diligently pursue an immigration matter and to keep the client informed; prior private reprimand) and In re Stewart, 118 N.J. 429 (1990) (public reprimand for gross neglect of an estate matter and failure to keep the client informed; prior private reprimand). One member did not participate.

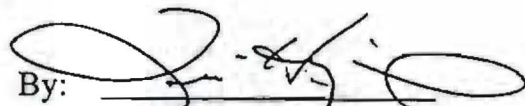
The Board further determined that respondent should take twelve hours of Continuing Legal Education courses over a one-year period and provide proof of completion to the OAE. The Board also directed that respondent refund \$245 to Cuadra and that the OAE audit respondent's accounts. The Board did not retain jurisdiction.

Finally, the Board determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

12/11/98

By: _____



LEE M. HYMERLING
Chair
Disciplinary Review Board