

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-341

IN THE MATTER OF :
:
EMIL RESTAINO, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 8, 1992

Decided: February 25, 1992

David M. Paris appeared on behalf of the District VC Ethics Committee.

Respondent 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 VC Ethics Committee (DEC).¹ Respondent filed an answer in this matter denying the essential allegations set forth in the formal complaint. During his appearance before the DEC, respondent withdrew his denial and substantially admitted the allegations.

Respondent was admitted to the practice of law in New Jersey in 1983 and has been engaged in private practice in Bloomfield, Essex County. From December 1986 until May 1988, respondent was

¹ Count 2 of the within complaint refers to a matter for which respondent was privately reprimanded in 1991 (The Skarzynski matter). That count charged respondent with a pattern of neglect, when the instant and the earlier matters are taken in concert.

associated with the law offices of G. Robert Sarcone. In May 1988, respondent became an attorney for Anchor Savings Bank. In December 1988, respondent returned to Sarcone's office. During his appearance before the Board, respondent explained that he no longer works for Sarcone, but apparently began his own practice with another attorney from Sarcone's office (BT6).²

Carmen Escobar retained respondent, in or about October 1987, in connection with the sale of her delicatessen.³ The business was sold to two men for a purchase price of \$20,000, with an initial payment of \$2,000 and monthly installments of \$1,000. Respondent prepared an agreement of sale and closing took place on October 12, 1987, at the home of a friend of Escobar. Respondent indicated to the panel that he did not attend the closing. Other than the agreement of sale, no other document evidencing a security interest in the delicatessen's assets was provided by respondent. Respondent never billed Escobar for his services in the transaction.

Beginning in November 1987, the purchasers of the business defaulted on their monthly payments. In December 1987, Escobar contacted respondent and asked him to pursue collection of the overdue payments. Early in 1988, respondent met with the purchasers and attempted to work out the payment difficulties.

²BT refers to the transcript of the hearing before the Board on January 8, 1992.

³Respondent had previously represented Escobar in connection with a personal injury action arising out of an automobile accident. Respondent handled that matter to Escobar's satisfaction and the two became friends.

These attempts were unsuccessful. In March 1988, respondent and Escobar agreed to pursue legal action against the two purchasers. Respondent explained to Escobar that he was unable to represent her in New York, but went on to say that he had a friend in New York who owed him a favor. Respondent never contacted an attorney in New York to pursue the claim (T44-45).⁴ Escobar believed that this "friend" was representing her in New York in this matter. No action to collect the money was initiated in New York by respondent or by anyone else.

Over the next two years, respondent made numerous misrepresentations to Escobar regarding the status of her claim. Escobar testified that, after May 1988, she occasionally telephoned respondent to inquire about the status of the matter. She was reassured that the matter was proceeding apace and that she would receive her money. On one occasion, respondent informed Escobar that the home of one of the purchasers was up for a foreclosure sale and that Escobar would receive money out of the proceeds of the sale. Respondent caused Escobar to believe that the sale was a result of his and his "friend's" efforts.

On March 27, 1990, Escobar telephoned the law offices of G. Robert Sarcone, where respondent was then employed. Sarcone indicated to Escobar that he was unaware of any matter having been initiated by his office on her behalf. As a result of that conversation, respondent wrote to Escobar, stating that, as she was

⁴T refers to the transcript of the hearing before the DEC on September 9, 1991.

aware, the individuals who had purchased her business had left the jurisdiction and could not be located. Despite that statement, on May 17, 1990, respondent took Escobar to New York, informing her that they were going to collect her money from the county clerk's office. Respondent told Escobar to wait in the car while he went to collect the money. Shortly thereafter, respondent returned stating that the office was closed and that he would return the following day to get the money. On May 18, 1990, respondent telephoned Escobar and informed her that, although he had returned to New York, he had been unable to collect her money because Judge Wilks, who was hearing her case, was on vacation. That was the last contact Escobar had with respondent. Respondent testified that the purpose of the trip to New York was "to buy time" (T45).

On the same day that respondent went to New York to allegedly get her money, Escobar decided to go to New York and confirm respondent's representations. She was accompanied by her brother-in-law, Porfidio Rodriguez.⁵ Escobar went to the Supreme Court building in New York and was informed that Judge Wilks was not on vacation. In addition, she determined that there was no case pending in her name against the purchasers. Escobar then returned to New Jersey and proceeded to Sarcone's office. She was able to speak with Sarcone, but not with respondent.

At the DEC hearing, respondent testified that he had, in fact, attempted to locate the defendants in this matter, but had been

⁵Rodriguez testified before the DEC and confirmed Escobar's version of the events that transpired.

unsuccessful. Respondent admitted that he should have made that fact clear (T45).

With regard to harm to Escobar due to respondent's actions, the record does not reveal the current status of Escobar's claim.

In mitigation of his conduct in both the Skarzynski and Escobar matters, respondent stated that he had an unrealistic belief that he could handle all types of legal matters. Respondent further stated that, given the supervision Sarcone provides and the structure of his current practice, the possibility that he would make the same mistakes has been eliminated.⁶

The DEC determined that respondent was guilty of the neglect and misrepresentation charged in the first and third counts of the complaint. The DEC did not find respondent guilty of a pattern of neglect. The DEC was disturbed by the extent to which respondent made misrepresentations to his client, but believed that respondent has learned his actions were foolish. The DEC recommended that any public discipline imposed include both a provision for mandatory counseling to help respondent understand the severity of his actions and a proctorship to prevent a repetition of his previous misconduct.

⁶During his appearance before the Board, respondent indicated that, although he no longer works for Sarcone, a strong bond remains between them and he can still ask Sarcone for guidance (BT 6).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the findings of the DEC that respondent is guilty of unethical conduct are supported by clear and convincing evidence. Respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 8.4(c). The DEC did not find respondent guilty on the second count of the complaint wherein he was charged with a pattern of neglect, in violation of RPC 1.1(b). The Board agrees with the DEC on this count, having previously determined that at least three matters are necessary for such a finding.

In In re Kasdan, 115 N.J. 472 (1989), the Court addressed the issue of misrepresentation to a client, stating that "...intentionally misrepresenting the status of lawsuits warrants public reprimand." Id. at 488. Given the Court's holding in Kasdan and respondent's other infractions of the disciplinary rules, he must receive at least a public reprimand for his misconduct.

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 a 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).

While the case at hand bears similarities to cases which have resulted in lengthy suspensions, this case does not reflect the common element of forgery of documents found therein. See e.g. In re Chidiac, 109 N.J. 84 (1987); In re Yacavino, 100 N.J. 50 (1985); In re Fleischer, 66 N.J. 398 (1975); In re Weingart, ___ N.J. ___ (1992). However, respondent agreed to pursue this matter in March 1988 and perpetrated his lies until May 1990. In addition, his actions in taking Escobar to New York on a wild goose chase rises to an appalling level of misrepresentation.

As noted above, respondent filed an answer to the formal complaint denying all charges, including that he had ever been retained in this matter (See Exhibit B to Panel Report). Subsequently, when appearing before the DEC, respondent admitted the charges against him. See In re Gavel, 22 N.J. 248 (1956). The Board considered that, although respondent withdrew his answer to the committee, he nevertheless filed an answer that did not conform with the mandates of Gavel.

Respondent did not present any factors in mitigation of his misconduct. Rather, the focus of his testimony was that his conduct would not reoccur.

As noted above, respondent was privately reprimanded by letter dated April 1, 1991, for misconduct in handling a workers' compensation matter. Respondent was found guilty of lack of diligence, failure to communicate with his client, failure to communicate the basis of a fee, failure to turn over a file to new counsel and failure to answer the ethics complaint filed against him. Respondent's misconduct in the case at hand occurred prior to the issuance of the letter of private reprimand. Thus, the Board cannot conclude that respondent failed to learn from the discipline previously imposed.

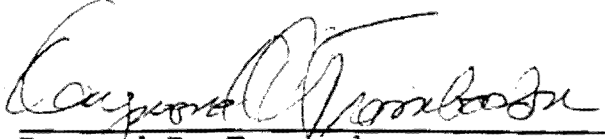
A majority of the Board has determined that respondent's misconduct is worthy of a term of suspension of six months and so recommends. One member viewed the misconduct in a more serious light and voted for a one year suspension. One member did not participate.

The DEC recommended a requirement of psychiatric counseling to enable respondent to understand the severity of his misconduct. From the record, this step appears unnecessary inasmuch as no connection between respondent's misconduct and psychiatric difficulties has been argued or made. However, the DEC's recommendation that respondent be required to practice under the supervision of a proctor appears to be a reasonable step to ensure protection of the public. Accordingly, the Board recommends that,

upon reinstatement, respondent be required to practice under the supervision of a proctor for one year.

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

Dated: 2/25/92

By: 

Raymond R. Trombadore
Chair
Disciplinary Review Board