SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-351

IN THE MATTER OF	:
ERNEST R. COSTANZO,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 8, 1992

Decided: February 25, 1992

James F. Hammill appeared on behalf of the District IV Ethics Committee.

Respondent did not appear.[1]

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 IV Ethics Committee (DEC). Respondent neither filed an answer to the formal complaint in this matter, nor appeared before the DEC.

Respondent was admitted to the practice of law in New Jersey in 1974. On October 24, 1990, he was temporarily suspended for failing to pay administrative costs assessed against him as ordered by the Court in an earlier disciplinary matter. Respondent remains under suspension.

Respondent was privately reprimanded by letter dated July 25,

[1]Respondent did not appear at the Board hearing or waive his appearance, despite proper notice by publication.

1983, for misconduct during his handling of a foreclosure matter. Respondent was publicly reprimanded by Order dated June 13, 1989 for failing to communicate with his client, failing to carry out a contract of employment and engaging in the practice of law while on the ineligible list for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

The DEC considered twelve matters in this proceeding. The facts of each are as follows:

The Coleman Matter (District Docket No. IV-90-37E)

Marlene Coleman met with Robert Mull of Credit Care, an organization that allegedly assisted individuals with their financial dirficulties. Mull suggested she speak with respondent, who was on Mull's staff, for assistance with a bankruptcy proceeding.[2] On November 4, 1989, Mull and respondent traveled to Coleman's home, where they reached an agreement for legal services. Coleman paid respondent $490. On December 16, 1989, Coleman paid an additional $400. Coleman was told that of the $890 paid, $800 was to cover the attorney fees and $90 was for filing fees. When Coleman contacted respondent on February 9, 1990, she was told that he did not have a court date for her matter yet and that he would

[2]According to Coleman's testimony, Mull told her that if he, Mull, could not help repair a client's credit, respondent worked with him in assisting the client to file for bankruptcy (T10). (T represents the transcript of the hearing before the DEC on April 11, 1991).

get back to her.[3] After the February conversation, Coleman made a number of telephone calls to respondent to obtain information about the status of the proceeding. Although she left messages on an answering machine and with respondent's secretary, she never received a response from respondent. In June 1990, Coleman attempted to reach respondent through Mull. She was told that respondent no longer worked at Credit Care. Apparently, respondent never filed a bankruptcy petition on Coleman's behalf. Coleman has obtained the services of another attorney who is pursuing the bankruptcy matter on her behalf.

The Brennan Matter (District Docket No. IV-90-41E)

In 1988, John Brennan paid respondent $980 to represent him in a bankruptcy proceeding. It appears that a petition was filed and the matter discharged. However, approximately two and one-half years later, Brennan received letters from a mortgage company, threatening him with a foreclosure action.[4] Brennan, after some difficulty, was able to reach respondent, who met with him in the former's home. After reviewing the letters Brennan had received, respondent indicated that there must have been a mistake in the original petition and that he had obtained the wrong "judgment."

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[3]Coleman testified that she may have had an earlier conversation with respondent in January 1990, but she did not recall it with certainty.

[4]The mortgage company also had difficulty communicating with respondent.

Respondent told Brennan that he would get back to him, but that there was nothing he could do. Thereafter, respondent never contacted Brennan. Still threatened with the foreclosure, Brennan sought the services of another attorney, who resolved the matter on Brennan's behalf.

The Hicks Matter, (District Docket No. IV-91-03E)

On November 22, 1989, Lucille and Michael Hicks retained respondent to represent them in a bankruptcy action, paying him $890.[5] Thereafter, the Hickses believed that respondent was pursuing the matter on their behalf. In April 1990, the Hickses' car was repossessed.[6] They contacted the Bankruptcy Court to determine the status of their case. They learned that, although respondent had taken some steps on their behalf, he failed to file the necessary papers to complete the proceedings and that the bankruptcy petition was about to be dismissed. Thereafter, the Hickses made numerous attempts to speak to respondent, who continuously failed to answer their requests for information. When he finally was contacted, respondent told the Hickses that the difficulty was not his fault, but that of the court for misfiling documents. On May 31, 1990, the bankruptcy court issued an order to show cause why the proceeding should not be dismissed for

[5]As in the Coleman matter, the Hickses were referred to respondent through Credit Care and the representation occurred during the same time period.

[6]On June 18, 1990, respondent apparently did appear in court on the Hickses' behalf with regard to their car.

failure to file the correct documents.[7] That order apparently was vacated on June 26, 1990, based upon respondent's representation that the documents had been filed. On October 23, 1990, a second order to show cause was issued, stating that respondent's representation regarding the documents was incorrect. During a conversation between the Hickses and respondent on November 6, 1990, respondent told the Hickses that the matter had been taken care of and that the court had mixed up the documents. He further indicated that he would "check into it."

Respondent had been suspended by order of the Supreme Court, effective October 11, 1990. Respondent did not in any way make the Hickses aware that he was no longer able to represent them. Quite the contrary, the Hickses believed he was still pursuing the bankruptcy matter on their behalf. It was not until the Hickses appeared in court on November 13, 1990, that they learned that respondent had been suspended from the practice of law. The Hickses then obtained another attorney. They testified before the DEC that the bankruptcy was proceeding apace.

The Fox Matter (District Docket No. IV-90-86E)

Gloria Fox retained respondent in mid-1987 to represent her in a bankruptcy action. Fox was referred to respondent through Financial Consultants, an organization she had contacted for assistance with her financial difficulties. Fox paid a total of

[7]Lucille Hicks testified that at approximately that time, respondent had someone telephone her to say that the necessary papers had been filed with the court (T52).

$890, $590 to respondent and $300 to Financial Consultants.[8] During the pendency of the bankruptcy proceeding, Fox became aware of a problem with her mortgage, of which she informed respondent. Subsequent to the discharge of the bankruptcy, Fox received notice of a foreclosure action. Fox made numerous attempts to reach respondent, testifying that he would return one out of approximately every one hundred telephone calls she made to him (T93). In addition, she explained that during the time he represented her, respondent had his office in several locations. When she was able to reach him, respondent promised that he would pursue the matter on her behalf. Nonetheless, respondent failed to take action on Fox's behalf. In order to resolve the matter, Fox was forced to hire another attorney, who stated to Fox that respondent had "ruined the entire case" (T111). Further, Fox was apparently forced to pay an additional $4,000 in legal fees in her efforts to remedy the situation.

The District IV Matter (District Docket No. IV-90-76E)

John Landers, Esq. referred a letter to the OAE that had been received by his daughter.[9] The letter was from a collection agent and bore respondent's name (misspelled on both the typed letterhead

[8] Fox was told that the $300 was part of a total sum of $890 and that the money would be paid over to respondent (T90-91).

[9] Although more than one letter was sent to Landers' daughter, it is not clear from the record exactly how many she received.

and the signature line).[10] The letter was dated February 15, 1991, subsequent to the time of respondent's suspension from the practice of law.

There was no testimony taken at the DEC hearing on this matter. Respondent never replied to these charges. The DEC nonetheless determined that there was no clear and convincing evidence that respondent was in fact, responsible for the letters. The DEC recommended that the OAE undertake an investigation into the matter.

The Fowler Matter (District Docket No. IV-90-42E)

Mary Fowler paid respondent $890 on October 18, 1989, to represent her in a bankruptcy proceeding. Having not heard from him, in January 1990, Fowler began telephoning respondent to determine the status of her matter. She was consistently unable to reach him. Also, respondent failed to return her calls. On May 3, 1990, Fowler received foreclosure documents from her mortgage company and telephoned respondent, leaving a message. Fowler then telephoned the bankruptcy court and was told that no petition had been filed on her behalf. On May 4, respondent did telephone Fowler and stated that the petition had been mailed and must have been lost. Two nights later, Fowler and her husband went to respondent's office, at which time respondent told them not to

[10] In his letter forwarding the letters to the DEC, Richard J. Engelhardt, Esq., Counsel for the Director, Office of Attorney Ethics, (OAE) stated that, during a telephone call to the number on the letterhead, he was told that the misspelling was a typographical error.

worry. At a second meeting on the following night, the Fowlers brought mortgage documents to respondent, who then described steps they could take as alternatives to the bankruptcy. The Fowlers insisted on the Chapter 13 proceeding. Respondent then indicated that he would prepare documents for them to sign and set up another meeting with Fowler. The morning of their scheduled meeting, Fowler received a telephone call from respondent, wherein he told her that he had to be in court and would not be available for their scheduled meeting. During that conversation, Fowler insisted that the petition be filed. Respondent stated that he would drop the documents off at her home. Respondent never delivered the documents and, further, never filed the bankruptcy petition. The Fowlers indicated that they were responsible for attorney fees of $1,500 to $2,000.

The Worthy Matter (District Docket No. IV-90-71E)

Brenda Worthy retained respondent to file a bankruptcy petition. Respondent was paid in April 1990. As of October 1990, no petition had been filed with the court and Worthy was still being sued by her creditors. No testimony was taken on this matter before the DEC. The DEC noted that, at the time of respondent's suspension, Worthy still believed that respondent was acting on her behalf and had not been told of his suspension.

The Mull Matter (District Docket No. IV-90-72E)

Robert Mull retained respondent to represent him in a divorce proceeding. Mull paid respondent $350 on April 30, 1990. On October 10, 1990, Mull was informed that his case would be dismissed. Mull indicated in his grievance that he was unable to locate respondent, who made no effort to contact him.

The Vanwart Matter (District Docket No. IV-91-05E)

William Vanwart retained respondent in February 1990 to file a bankruptcy proceeding, paying him $920.[11] In September, having received no communication from respondent, Vanwart attempted to contact him, leaving several messages over a three-week period. Respondent never returned the calls.

In October, Vanwart did reach respondent, who indicated that he would check on the matter. In November, Vanwart was served with a collection notice by the Morris County Sheriff's Department. He attempted to contact respondent, who had relocated his office. Approximately two weeks passed before Vanwart was able to obtain a new telephone number for respondent, which was an answering service. After leaving numerous messages, Vanwart spoke to respondent, who again took information regarding his case. One week later, Vanwart contacted respondent, advising that it was urgent that they meet. An appointment was set up, which respondent failed to attend. One week later, a second appointment was

[11]The DEC's finding indicates that respondent was paid $120. However, Vanwart's grievance states that the figure was $920.

arranged and, again, respondent failed to appear. By mid-December 1990, Vanwart had left numerous messages for respondent. Creditors were again telephoning Vanwart, who contacted the bankruptcy court to determine the status of his petition and discovered that no petition was ever filed on his behalf. Vanwart was never advised by respondent of his October 1990 suspension.

The Farmer Matter (District Docket No. IV-90-40E)

In 1983, Russell Farmer, Jr., brought a disciplinary proceeding against respondent, wherein respondent was found to have violated DR 7-101(A)(2), and resulted in respondent's previously noted private reprimand.[12] Later, Farmer obtained a judgment for $15,027.65 against respondent for legal malpractice arising out of the representation. Farmer was not paid on that judgment. In 1985, during discovery in aid of execution, respondent claimed that he was not working and was unable to pay. Respondent apparently indicated that he would pay Farmer when he was working. Since that time, respondent began working again. Yet, as of the date of the DEC hearing, no payment had been made to Farmer on the judgment.

The DEC determined that respondent's actions did not constitute unethical conduct under the Rules of Professional Conduct and, accordingly, dismissed the complaint.

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[12]The Rules of Professional Conduct replaced the Disciplinary Rules, effective September 1984.

The Bates Matter (District Docket No. IV-90-38E)

Elvina Bates, the executrix of an estate, paid respondent $8,146 for services related to the estate.[13] Bates estimated that respondent completed approximately ten hours of work and then could no longer be reached.

The DEC determined that they did not have sufficient information to make a determination of clear and convincing evidence of unethical conduct and requested that the OAE further investigate the matter.

The Jones Matter (District Docket No. IV-90-39E)

On April 21, 1990, Seth Jones paid respondent $800 to represent him in a bankruptcy proceeding. On April 28, 1990, Jones paid an additional $120 to cover filing fees. Also on that date, Jones signed certain documents and was told by respondent that he would receive copies. Despite repeated requests, Jones never obtained the copies. Jones attempted to contact respondent by telephone and sent him a letter requesting that respondent's fee be returned.[14] As of the date of the DEC hearing, Jones had not heard from respondent.

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[13]Although it appears that Bates paid respondent this sum in advance, this fact is not clear from her grievance.

[14]The record does not reveal when the letter was sent to respondent.

* * *

The DEC found respondent guilty of unethical conduct in nine of the twelve matters presented. In each, the DEC found gross neglect of client matters, in violation of RPC 1.1(a)[15]; lack of diligence, in violation of RPC 1.3[16]; failure to keep the client reasonably informed as to the status of the matter and failure to explain matters in order to enable the client to make informed decisions about their case, in violation of RPC 1.4(a) and (b). Further, in all but the Mull matter, the DEC found a violation of RPC 1.5(b), in that respondent failed to enumerate the rate or basis for his fee in writing.[17] In addition, the DEC determined that, when taken in concert, these matters revealed a pattern of neglect of client matters, in violation of RPC 1.1(b). The most serious violation found was in the Hicks and Vanwart matters, where the DEC concluded that respondent had violated RPC 5.5(a) when he practiced law while under suspension. Although not making a specific finding in this regard in the Worthy matter, the DEC did note that respondent failed to inform Worthy of his suspension from the practice of law.

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[15]The DEC did not specifically enumerate the finding of a violation of RPC 1.1(a) in the Jones matter. However, from the language of the report, it seems clear that such a finding was made.

[16]In the Vanwart matter, this charge is mistakenly referred to as RPC 1.1(c).

[17]In the Brennan, Hicks, Fox, and Fowler matters, the DEC found that respondent failed to provide a retainer setting forth the basis of his fee, but did not specifically enumerate a finding of a violation of RPC 1.5(b). The Board infers this violation.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees with the determination of the DEC that the evidence clearly and convincingly proves respondent guilty of numerous instances of unethical conduct. However, contrary to the DEC, the Board finds that respondent's misrepresentations to his clients wherein he informed his clients that he was pursuing their matters, when he was not, violated RPC 8.4(c) and constituted abandonment of the clients so treated.[18]

In sum, respondent is guilty of numerous cases of gross neglect, misrepresentation, lack of diligence and failure to communicate, as well as practicing while suspended from the practice of law. In In re Goldstein, 97 N.J. 545 (1984), the attorney was disbarred for conduct similar to that of respondent. In eleven matters, Goldstein failed to carry out contracts of employment, failed to act competently and misrepresented the status of cases to his clients. In addition, Goldstein undertook the representation of a client in a matrimonial matter, after entering into an agreement with the Board and the district ethics committee that he would handle only criminal matters. Augmenting this malfeasance was the fact that, although he was under suspension for earlier misconduct, Goldstein continued to advise clients that he

[18]The Board further notes that respondent failed to comply with the requirements of Guideline 23 for suspended attorneys in the Hicks, Vanwart and Worthy matters.

was working on their cases, as did this respondent in the Hicks and Vanwart matters.

Similarly, in In re Dailey, 87 N.J. 583 (1981), the attorney was disciplined for eighteen instances of failure to carry out contracts of employment and failure to comply with recordkeeping requirements. In addition, Dailey undertook the representation of clients while subject to an order of ineligibility issued by the Court for failure to pay the annual Clients' Security Fund fees. The Court found that Dailey had demonstrated "a complete disregard for the duties and responsibilities of an attorney-at-law of this state." Id. at 594. Dailey was disbarred.

In this case the DEC found respondent guilty of misconduct in nine matters, dismissing three for lack of clear and convincing evidence of unethical conduct. While the DEC may have been correct in its findings in the Farmer and Bates matters, the Board disagrees with the DEC with regard to the Committee matter.[19] The DEC concluded that there was no clear and convincing evidence that respondent was, in fact, responsible for the letters sent to Landers' daughter. However, while there may be a presumption that respondent is innocent of the misconduct charged in the complaint, such a presumption is rebuttable, and has been rebutted here. First, respondent was on notice of this allegation in the complaint

[19]The DEC recommended that the OAE undertake further investigation in the Committee and Bates matters. The Board is aware that, since these matters were already formally charged, further investigating and recharging them would subject respondent to double jeopardy in these matters. The Board agrees with the DEC that there is a lack of clear and convincing evidence in the Farmer and Bates matters and dismisses those matters.

and chose not to respond to it. In addition, in his letter referring this matter to the committee, Richard J. Engelhardt noted that, during his conversation with Mr. George, who answered the telephone number on the letterhead, George confirmed that respondent had allowed him to use the office as a collection office. Respondent's name appeared as the signatory on the letter. Further, as noted at the hearing before the DEC, respondent is the only attorney listed in the Lawyers' Diary with the name of Ernest R. Costanzo (T122-123). While, as noted at the DEC hearing, "[t]here could be somebody in North Jersey named Harry Bitzfitz that's using the name [respondent] and could have gotten it out of the Lawyers Diary" (T123), this possibility is extremely unlikely. Indeed, given respondent's prior involvement with bankruptcy matters and credit organizations, his association with a collection agency is plausible. Additionally, as with all of the individual matters before this Board, respondent has failed to present anything in his defense. While the Board is mindful of the fact that the evidence against respondent in this matter may be deemed circumstantial, it is also mindful that such evidence may indeed prove clear and convincing. See In re Johnson, 105 N.J. 249 (1986), where, in a misappropriation case, the Court held that "... an inculpatory statement is not an indespensible ingredient of proof of knowledge, and that circumstantial evidence can add up to the conclusion that a lawyer "knew" or "had to know" that clients' funds were being invaded;..." Id. at 258. Taking into account the totality of the evidentiary components before it, the Board has

determined that respondent was responsible for the letters and, therefore, finds that respondent was practicing while suspended.

Respondent's contumacious attitude toward the disciplinary system, as reflected in his failure to cooperate with the DEC, his suspension resulting from failure to pay costs assessed against him, his failure to advise clients of his suspension, his actions in leading his clients on after his suspension and, indeed, his practicing after being suspended, is nothing short of appalling. As the presenter pointed out to the Board, "[respondent] has defied the Supreme Court" (BT3).[20] Given these factors, respondent's disciplinary history and the egregious misconduct illustrated above, the only appropriate discipline in this matter is disbarment. The Board unanimously so recommends. One member did not participate.

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

[20]BT represents the transcript of the hearing before the Board on January 8, 1992.