

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 88-273, 89-049
and 89-052

IN THE MATTER OF :
ROBERT B. CLARK :
AN ATTORNEY-AT-LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 19, 1989

Decided: November 7, 1989

Raymond J. Fleming and Sheldon Schiffman appeared on behalf of the District VB Ethics Committee.

Respondent appeared pro se.

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

These matters are before the Board based upon three presentments filed by the District VB Ethics Committee.

DRB 88-273

Abdus-Salaam and Bona Fide Office Matters (VB-87-21E)

In August 1985, grievant, Sherry Abdus-Salaam, paid respondent \$200 to obtain a change of name for her daughter. Although grievant attempted to contact respondent on many occasions, she reached him only once. At that time, respondent advised her that a complaint had been filed in her daughter's behalf.

Sometime in 1986, after further unsuccessful attempts to contact respondent, grievant telephoned the court clerk's office and discovered that respondent had never filed a complaint in the matter.

The original ethics grievance was filed with the ethics committee in March 1987. Thereafter, respondent failed to reply to letters and to several messages left with respondent's answering service by the committee's secretary and the investigator.

On February 23, 1988, at 11:30 a.m., the investigator visited respondent's office. The office appeared to be furnished, but no one was present. On March 16, 1988, in reply to a letter sent by regular mail, respondent finally telephoned the investigator and explained that he was involved in a lengthy criminal trial. Respondent failed to contact the investigator later in the week, as promised.

Respondent did not file an answer to the formal ethics complaint. At the ethics hearing, respondent admitted that he inadvertently failed to file the complaint to change the name of grievant's daughter and that he had not returned the \$200 retainer to grievant. Respondent explained that he was experiencing serious marital problems when he was retained by grievant and that he became involved in a lengthy criminal trial. Respondent admitted that he did not have a secretary to receive telephone calls but, instead, employed an answering service in late 1984. Respondent attributed the difficulties in contacting him to his involvement in the criminal trial which lasted from June 1987 to April 1988.

The hearing panel concluded that respondent was guilty of gross negligence, contrary to RPC 1.1(a); failure to act diligently, contrary to RPC 1.3; failure to keep his client reasonably informed, contrary to RPC 1.4(a); and failure to maintain a bona fide office pursuant to R. 1:21-1(a). The panel recommended that respondent be publicly disciplined.

DRB 89-049

Anastasio Matter (VB-88-18E)

In June 1986, grievant, Dominick Anastasio, contacted an attorney regarding a nuisance complaint filed against grievant as a result of the operation of his garage in Dover, New Jersey. On June 23, 1986, the attorney requested that the municipal court enter a not-guilty plea. In addition, the attorney requested a two-week adjournment to allow respondent, as designated counsel, time to prepare a defense. Respondent subsequently discussed the matter with grievant and requested a \$500 fee. Grievant gave respondent a check for \$500, which was returned for insufficient funds.

In July 1986, respondent again met with grievant regarding a second nuisance complaint. Respondent requested an increased fee of \$625. After grievant did some mechanical work on respondent's car and charged him \$80 for parts, that sum was deducted from respondent's fee. On September 4, 1986, grievant paid respondent \$545.

On April 29, 1987, the municipal court notified respondent of a May 12, 1987 trial date. Respondent instructed grievant to appear on the trial date and to inform the judge that respondent was unable to appear because of his involvement in the aforesaid criminal trial. On the trial date, at which grievant appeared, he was directed by the judge to obtain new counsel. Grievant contacted respondent on the following day, at which time he was informed that respondent would be unable to represent him and that respondent would refund all or part of the fee. Thereafter, grievant obtained new counsel.

On June 9, 1987, grievant's new attorney wrote to respondent requesting a refund of the entire retainer of \$545 in addition to \$258.84 for repairs that grievant had made on respondent's car. Respondent failed to refund any portion of the retainer to grievant.

In his answer to the ethics complaint and at the ethics hearing, respondent denied any wrongdoing and claimed that he spent ten hours on grievant's case. He testified that his billing rate was \$85 per hour, but admitted that he did not keep any time records. Grievant estimated that he met with respondent four times, each session lasting about one-half hour.

The hearing panel determined that respondent had acted diligently. However, without passing upon respondent's earned fee, the panel concluded that respondent had violated RPC 1.16(d) when he failed to return any of the unearned fee to grievant. The panel recommended that respondent be publicly disciplined.

DRB 89-052

Bristol Matter (VB-86-17E)

In September 1985, grievant, Kenneth Bristol, retained respondent to represent him in the appeal of an adverse summary judgment on his claim of employment discrimination against his employer. Grievant paid respondent \$300 to initiate the appeal.

In October or November 1985, grievant received a letter from the appellate court requesting a brief on the matter. When contacted by grievant, respondent told him that a brief would be filed. Thereafter, grievant's numerous efforts to contact respondent were fruitless.

On January 27, 1986, grievant's appeal was dismissed for "failure to timely prosecute." Copies of the order of dismissal were sent to both grievant and respondent. Grievant's subsequent attempts to contact respondent were unsuccessful until eight or nine months after the dismissal. Respondent thereafter returned grievant's files, but failed to refund the \$300.

At the ethics hearing, grievant testified that respondent did not employ a secretary or a receptionist. Grievant stated that his numerous telephone calls to respondent were never answered. Respondent failed to file an answer to the ethics complaint.

The hearing originally scheduled for June 16, 1987 was adjourned at the request of respondent's attorney. Neither respondent nor his attorney, however, appeared at the rescheduled

hearing held on June 9, 1988. The panel found that "all of the allegations in the various complaints have been proven."¹

The panel concluded that respondent did not act diligently, contrary to RPC 1.3; failed to adequately communicate with his client, contrary to RPC 1.4(a); and failed to maintain a bona fide office pursuant to R. 1:21-1(a). The panel recommended that respondent be publicly disciplined for his unethical conduct in this and the following two matters.

Adams Matter (VB-86-29E)

Respondent was assigned by the Office of the Public Defender to represent an individual in an appeal.² On May 9, 1985, respondent was ordered by the Appellate Division to submit a brief no later than May 20, 1985, or face a \$150 sanction.

Respondent failed to submit a timely brief. The Appellate Division wrote to respondent in March and April 1986 requesting payment of the \$150 sanction. On May 28, 1986, the Appellate Division notified the ethics committee that respondent failed to pay the sanction.

Respondent did not submit an answer to the ethics complaint. The Hearing Panel concluded that respondent failed to act

¹The Torres matter (VB-86-39E) was dismissed on motion by the presenter.

²The record does not address the underlying nature of the appeal or how respondent came to represent the individual.

diligently contrary to RPC 1.3, and failed to adequately communicate with his client contrary to RPC 1.4.

Williams Matter (VB-86-36E)

In June 1985, grievant, Georgia Williams, was referred to respondent by her then attorney. Respondent agreed to represent grievant in a workers' compensation matter and instructed her to contact him the following week. From June 1985 until March 1986, grievant made numerous attempts to contact respondent by telephone, all without success.

On February 10, 1986, grievant's original attorney wrote to respondent stating that "[o]n several occasions I have requested that you call Mrs. Georgia Williams concerning her Workers' Compensation case. Mrs. Williams has indicated to me that she has tried to contact you for numerous months and you have yet to return the calls or to answer her questions." The attorney requested that respondent contact grievant within one week from receipt of the letter. Respondent failed to contact either grievant or the attorney.

Respondent did not file an answer to the ethics complaint. The panel concluded that respondent failed to act diligently, contrary to RPC 1.3, and failed to adequately communicate with his client, contrary to RPC 1.4.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board is satisfied that the majority of the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence. However, the Board does not agree with the committee's conclusion that respondent failed to maintain a bona fide office.

R. 1:21-1(a) states, in pertinent part:

... a bona fide office is a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a mail drop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.

In this case, the committee investigator visited respondent's office and noted that the office was furnished and respondent's name was on the door. Furthermore, respondent had an answering service and received mail at that location. He was, therefore, in substantial compliance with R. 1:21-1(a). Respondent admitted that he rarely replied to either telephone calls or to correspondence because of his involvement in a protracted criminal trial. Respondent's neglect of his cases and failure to communicate with clients does not compel a conclusion that he failed to maintain a bona fide office. In the absence of clear and convincing evidence of violations of R. 1:21-1(a), that aspect of each of the three presentments before the Board must be dismissed.

As to the remaining charges of unethical conduct, it is clear that respondent violated RPC 1.3 by failing to act with reasonable diligence in the Bristol, Adams, Williams, and Abdus-Salaam matters. In the Bristol matter, respondent failed to file an appellate brief, which resulted in a dismissal of the appeal. In the Adams matter, respondent failed to file a brief and failed to pay a sanction ordered by the Appellate Division. In the Williams matter, he failed to pursue a workers' compensation claim. In the Abdus-Salaam matter, respondent's failure to file a complaint to change the name of grievant's daughter also constituted gross negligence, contrary to RPC 1.1(a). Several months after respondent's assurances to the contrary, grievant discovered that the complaint had not been filed. Despite notification by grievant of his neglect, respondent never filed the complaint.

Moreover, in all of these matters, respondent violated RPC 1.4(a) by failing to communicate with his clients. Respondent failed in his obligation "to establish an office procedure so that both he and his clients are kept informed of pending matters." Matter of Haft, 98 N.J. 1, 7 (1984). Clients, an ethics investigator, an attorney, and an appellate court found it impossible to communicate, either by telephone or mail, with respondent. Finally, in the Anastasio matter, respondent violated R. 1.16(d) by failing to return any part of the \$545 retainer, despite promises to grievant and the request of grievant's new attorney.

Respondent's unethical behavior was aggravated by his lack of cooperation with the ethics committee. He failed to file an answer to all but one of the ethics complaints, in violation of R. 1:20-3(i). In addition, he failed to appear at one of the ethics hearings. Respondent was obliged to fully cooperate with the ethics committee and its proceedings. Matter of Smith, 101 N.J. 568, 572 (1986); Matter of Winberry, 101 N.J. 557, 566 (1986).


Given the clear and convincing evidence of respondent's unethical conduct, this Board must determine the appropriate measure of discipline. The purpose of discipline is not to punish the attorney, but to protect the public from the attorney who does not meet the standards of responsibility required of every member of the profession. Matter of Templeton, 99 N.J. 365, 374 (1985). The quantum of discipline must accord with the seriousness of the misconduct in light of all relevant circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982). Mitigating factors, including contrition and admission of wrongdoing, are therefore relevant and may be considered. Matter of Robinovitz, 102 N.J. 57, 62 (1986). Personal or emotional problems are also mitigating factors to be considered. Matter of Tusso, 104 N.J. 59, 65 (1986).

In mitigation, the Board recognizes that respondent, who was admitted to the New Jersey Bar in 1979, has not previously been found guilty of unethical conduct. Also, respondent's marital difficulties and involvement in a ten-month criminal trial are factors that significantly mitigate his misconduct.

Unethical behavior similar to respondent's has usually resulted in a term of suspension. See, e.g., Matter of Smith, supra (attorney given a three-month suspension for failure to act diligently in a single matter, failure to maintain regular office procedure, and failure to cooperate with ethics committee). The Board recognizes that considerable mitigating circumstances surrounded respondent's misconduct. Nevertheless, the injury and turmoil that respondent wrought upon his clients cannot be ignored. Accordingly, the Board unanimously recommends that respondent be publicly reprimanded.

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

Dated: 11/2/88


Raymond R. Trombadore
Chair
Disciplinary Review Board