SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 89-082 and
89-235

IN THE MATTER OF :
:
BASIL D. BECK, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 18, 1989

Decided: February 5, 1990

Nelson C. Johnson appeared on behalf of the District I Ethics Committee.

Joseph D. O'Neill appeared on behalf of respondent.

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

This matter is before the Board based upon two presentments filed by the District I Ethics Committee.

DRB 89-082

DiEmma Matter (I-87-4E)

In October 1979, grievant, Rose DiEmma, retained respondent to represent her and her minor son in a personal injury claim arising out of an automobile accident.

In September 1982, respondent filed a complaint in behalf of grievant and her son. In May 1985, on the day of a scheduled

settlement conference, respondent's office telephoned grievant and requested that she appear with her son at the conference.

When grievant arrived at the settlement conference, she learned that respondent's associate would be handling the matter. Respondent was not present. Grievant rejected a settlement offer of $2,500 and insisted that respondent personally handle the matter. Dissatisfied with respondent's representation, grievant attempted to retain new counsel, but her efforts were unsuccessful.

In July 1985, both respondent and his associate appeared for the scheduled trial. A settlement for $8,500 was reached prior to trial. Respondent collected $1,000 for grievant but did not attempt to collect the remaining $7,500. Grievant's subsequent attempts to contact respondent were unavailing.

Finally, in March 1987, after grievant contacted the ethics committee, respondent made an application for a wage execution against the defendant to recover the balance of the settlement.

Respondent admitted the existence of communication problems with grievant but denied any wrongdoing, claiming that he was never retained by grievant to collect the settlement monies.

The hearing panel concluded that respondent had acted with gross negligence, contrary to RPC 1.1(a); had failed to act with reasonable diligence, contrary to RPC 1.3; and had failed to keep his clients "reasonably informed about the status of their file", contrary to RPC 1.4.

Lupperger Matter (I-87-08E)

Sometime in 1985, grievants, Josephine and Ferdinand Lupperger, retained respondent to file a motion to reduce Mr. Lupperger's support payments to his former wife. Respondent had handled Mr. Lupperger's divorce and agreed to personally handle this matter, rather than entrust it to one of his associates.

In December 1985, respondent filed a motion in behalf of Mr. Lupperger. Thereafter, the matter was handled by one of respondent's associates. In November 1986, the motion was denied because there was insufficient evidence of grievants' income. Respondent failed to inform grievants of that decision.

Between November 1986 and January 1987, grievants attempted to contact respondent to ascertain the status of the matter. Respondent failed to reply to grievants' written and telephonic inquiries. Sometime prior to the filing of the ethics complaint, grievants contacted the court and discovered that the motion had been denied. Thereafter, grievants again attempted to contact respondent, without success.

Through his attorney, respondent admitted most of the factual allegations contained in the ethics complaint.

The hearing panel concluded that respondent had failed to act diligently, contrary to RPC 1.3, had failed to keep his client reasonably informed, contrary to RPC 1.4, and had misrepresented

to his client that he would personally handle the file, contrary to RPC 8.4(c).

Pierce Matter (I-87-01E)

In October 1979, grievant, Benjamin Pierce, retained respondent to represent him in a variety of matters, including a personal injury claim. This claim was settled on February 9, 1984; a written order of settlement was entered on March 14, 1984.

Pursuant to the terms of the settlement, the insurance carrier was to pay up to $6,000 for any plastic or reconstructive surgery required by grievant, provided that it was performed within one year from the date of the settlement. Grievant contacted a surgeon in December 1984; surgery was scheduled for March 1985. However, grievant was informed that the insurance carrier would not pay for the surgery because it would not be performed within one year of the settlement date.

In August 1985, respondent's associate wrote to the insurance carrier in an attempt to obtain payment for grievant's surgery. By letter dated December 9, 1985, the insurance carrier formally declined payment. Thereafter, respondent took no action in behalf of grievant until intervention by the ethics committee, in early 1987.

From September 1985 and through the end of 1986, grievant made numerous written and telephonic attempts to contact respondent regarding the status of the case. Respondent ignored all of grievant's efforts to contact him.

Respondent's February 1987 motion to enforce the settlement, filed only after the ethics committee interceded, was denied in March 1987. Finally, in an April 19, 1988 letter, respondent's associate informed grievant that a subsequent appeal had been decided in his favor and that grievant could schedule surgery immediately.

Respondent, at the ethics hearing, denied any wrongdoing and claimed that grievant was responsible for ensuring that the surgery was performed within one year, pursuant to the terms of the settlement.

The hearing panel concluded that grievant was an "unsophisticated individual with limited skills. As such the respondent had a greater duty to make an effort to communicate properly with his client" and that respondent had "violated RPC 1.1 in that he handled this matter in a negligent fashion." In addition, the panel concluded that respondent had failed to act diligently, contrary to RPC 1.3, and to expedite litigation, contrary to RPC 3.2. Finally, the panel concluded that respondent

named as a defendant because he assured grievant's attorney that he would fairly resolve the partition of the partnership property.

Respondent filed an answer to grievant's complaint and continued as the attorney of record for the corporation and for grievant's brother individually until July 1986, when a substitution of attorney was filed. During the eleven months when respondent was defense counsel, he continued in partnership with grievant and his brother.

Grievant believed that respondent's representation of the corporation and his brother constituted a conflict of interest, and maintained that he never consented to that representation. Despite several requests made by grievant, respondent did not remove himself from the case.

Respondent, in his answer and at the ethics hearing, claimed that he discussed the conflict of interest issue with grievant's attorney at the outset and obtained his consent to respondent's representation of grievant's brother and the corporation. Respondent, however, admitted that he knew grievant wanted him out of the case at least as of March 1986. In addition, grievant's attorney, in an affidavit dated October 11, 1989, stated that respondent offered to remove himself from the case shortly after the complaint was filed. In March 1986, the attorney advised grievant to allow respondent to remain in the case because they were close to settling the matter.

The hearing panel concluded that the litigation instituted in behalf of grievant was a "matter substantially related to

Respondent's past representation of the Grievant and the Grievant's interests were materially adverse to those being represented by the Respondent." The panel concluded that respondent engaged in a conflict of interest, in violation of RPC 1.9, when respondent filed an answer to the complaint. The panel recommended public discipline.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board is satisfied that the conclusions of the ethics committee in finding respondent guilty of unethical conduct in the DiEmma, Lupperger, and Pierce matters are supported by clear and convincing evidence. The Board, however, does not find clear and convincing evidence of unethical conduct in the Garrison matter.

In the DiEmma, Lupperger, and Pierce matters, respondent failed to act with reasonable diligence and promptness, in violation of RPC 1.3, and exhibited a pattern of negligence, contrary to RPC 1.1(b). In DiEmma, for nineteen months, respondent did not take any action on behalf of his client to collect the balance of the settlement monies, and then acted only after the intervention of the ethics committee. This lack of action, coupled with respondent's failure to notify his client of the settlement conference within a reasonable period of time and to prepare her therefor, supports a finding of gross negligence, contrary to RPC 1.1(a), in addition to violation of RPC 1.3 and RPC 1.1(b).

Exacerbating his lack of diligence, respondent failed to adequately communicate with his clients in the DiEmma and Lupperger matters, contrary to RPC 1.4, and, in Pierce, failed to expedite litigation, contrary to RPC 3.2.

Unlike the district ethics committee, however, this Board does not find clear and convincing evidence that respondent engaged in an impermissible conflict of interest in the Garrison matter. Respondent acted as the attorney for grievant's brother and for the corporation in the suit instituted by grievant. Both grievant and his brother were the principal shareholders of the defendant corporation. Respondent had represented the corporation prior to grievant's complaint and had negotiated the sale of the corporation's major asset. Moreover, respondent owned property through a partnership with grievant and the defendant brother, which was tangential to grievant's litigation.

While there is little doubt that a conflict of interest existed, the Board does not believe that an ethics violation resulted. "Where a member of the bar represents a litigant in a cause, he should not thereafter represent the opposing party in any step in the proceedings in or arising out of the same cause." In re Palmieri, 76 N.J. 51, 63 (1978) (citation omitted). The litigation instituted by grievant directly arose out of the sale of a corporate asset negotiated by respondent. However, it is clear that respondent believed that the conflict had been cured and that he had obtained an informed consent from grievant to remain in the case, as required by RPC 1.9(a)(1). Respondent made several

offers to withdraw from the matter and obtained consent from grievant's attorney to remain as defense counsel. Indeed, grievant's own attorney, in an affidavit submitted to this Board, advised grievant to allow respondent to remain in the case.

While there is no clear and convincing evidence of unethical conduct in Garrison, it would have been the better practice for respondent to withdraw from the case. Respondent was closely involved in grievant's affairs relating to both the corporation and the partnership. Respondent should be mindful that "it is not only the potential for disclosure of confidential information which is at stake when a lawyer takes a case against a former client but also, and at least equally important, the appearance of wrongdoing." Id. at 63 (citation omitted).

Given the clear and convincing evidence of respondent's unethical conduct in DiEmma, Lupperger, and Pierce, 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). In recommending discipline, the interests of the public, the bar, and the respondent must all be considered. Matter of Kushner, 101 N.J. 397, 400 (1986). 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 personal,

emotional, and mental problems, may be considered. Matter of Tuso, 104 N.J. 59, 65 (1986).

Respondent was guilty of gross negligence and failure to communicate with clients. Such unethical behavior has warranted a public reprimand. See Matter of Bancroft, 102 N.J. 114 (1986). Respondent, however, also exhibited a pattern of neglect encompassing three matters. Attorneys who have been guilty of a pattern of neglect along with other ethics violations have, in many instances, been suspended from the practice of law. See, e.g., Matter of Templin, 101 N.J. 337 (1985) (attorney's pattern of neglect in four matters, failure to carry out contracts of employment, failure to communicate with clients, and failure to cooperate with the ethics committee warranted a one-year suspension).

This Board declines to recommend respondent's suspension from the practice of law because of several strong mitigating factors. Respondent, who was admitted to the New Jersey bar in 1963, was undergoing a traumatic divorce during the time of his unethical behavior. In addition, his unethical conduct was partially attributable to a high-volume practice that lacked appropriate staff. It is this Board's understanding that respondent has since hired several persons, including a certified public accountant, to assist him in his practice.

Accordingly, the Board unanimously recommends that respondent be publicly reprimanded. In addition, the Board recommends that respondent practice law under the supervision of a proctor approved

by the Office of Attorney Ethics for a period of two years. Three members did not participate.

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

Dated: 2/5/1990

Raymond R. Trombadore
Chair
Disciplinary Review Board