SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 87-168,
89-011, 89-104

IN THE MATTER OF

KEVIN F. WALL

AN-ATTORNEY-AT-LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 21, 1989

Decided: November 7, 1989

Charles W. Heuisler appeared on behalf of the District IV Ethics Committee.

Anthony F. DiMento 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 (DRB 87-168 and 89-104) and a recommendation for a private reprimand (DRB 89-011) filed by the District IV Ethics Committee.

DRB 87-168

Schipani Matter (IV-84-55E)

In early 1982, grievants, Ann and Frank Schipani, met with respondent to discuss pursuing a claim against a casino for encroachment upon their property in Atlantic City, New Jersey. Grievants were dissatisfied with another attorney who had been handling the matter and were referred to respondent by a Pennsylvania attorney who was not licensed in New

Jersey.

Grievants had difficulty in obtaining their file from their previous attorney, but finally were able to deliver the file to respondent in October 1982. At trial on June 22, 1983, respondent advised the court that he had handled grievants' file for four or five months, rather than the nine months he actually had the file.

Respondent arranged for an expert to testify on real estate values, but did not submit the expert's name to opposing counsel until one week before trial. The court subsequently withheld ruling on whether the expert would be permitted to testify. On June 22, 1983, the day of trial, grievants, who expected a minimum settlement of $ 15,000, reluctantly accepted a $ 10,000 settlement offer after respondent agreed to forego legal fees in the matter.

In early 1982, prior to the settlement of grievants' claim, respondent and the Pennsylvania attorney also discussed the casino encroachment issue with grievants' neighbors. Two contigent fee agreements were signed by some of the neighbors. These fee agreements appointed both respondent and the Pennsylvania attorney as counsel to prosecute any claims against the casino. The agreements also provided that the "attorneys' fee shall be paid at the rate of 7% of the total sales price" in the event the subject property was sold. Respondent also represented these individuals before the Atlantic City Zoning Board regarding problems with the casino's parking and shuttle bus routes.

In April 1983, respondent was approached by a California corporation and a realty company regarding the purchase of property within grievants' neighborhood. That corporation entered into option agreements with grievants and several of their neighbors in May 1983. These agreements provided that respondent would receive seven percent of the purchase price as a "legal fee" and the realty company would receive three percent as an "additional commission". Unbeknownst to respondent, the California corporation made arrangements to sell these properties to the casino.

On November 11, 1983, respondent and the realty company entered into a "Commission/Fee/Compensation Agreement" whereby all "commissions, fees, or compensations" resulting from the sale of properties to the California corporation would be "disbursed on the basis of a fifty/fifty (50/50) split" between respondent and the realty company.

The California corporation then exercised options on several of the properties. In January 1984, Settlement Statements relating to four of the sold properties indicated that respondent received in excess of $ 9,000 for "real estate services" in each sale. Respondent gave the realty company a two percent portion of his seven percent commission in accordance with the written agreement to split all fees equally. In March 1984, the California corporation sold the properties to the casino.

In his answer and at the ethics hearing, respondent denied any wrongdoing. Respondent claimed that he was not

acting as an attorney, but as a real estate broker in the sale of the properties to the California corporation.

The hearing panel concluded that respondent did not act with gross negligence in the settlement of grievants' claim against the casino. The panel also concluded that respondent's representations to the court in that matter were not unethical. In addition, the panel concluded that respondent was not guilty of engaging in a conflict of interest since he was unaware of the relationship between the California corporation and the casino. The panel, however, did conclude that respondent violated DR 3-102(A) by sharing a legal fee with a non-lawyer. The panel recommended that respondent be publicly disciplined.

DRB 89-011

Dadura and Shaw Matter (IV-88-5E)

In February 1985, grievants, Alex Dadura and Joan Shaw, requested that respondent represent them in connection with the recovery of stolen jewelry. Grievants previously were indicted for a variety of criminal acts against a woman who resided with them. Grievants were ultimately acquitted of the serious charges against them and it was discovered that the woman had stolen grievants' jewelry. The township in which grievants were arrested allegedly failed to investigate their complaint against the woman for stealing their jewelry.

Respondent told grievants that he was going to recover the jewelry and file a lawsuit against the township, the

State of New Jersey and any individuals involved in the sale of the stolen jewelry to various pawn shops. Respondent subsequently informed grievants of progress in the matter and that several settlement offers had been made by the township and insurance companies for the pawn shops.

In early 1987, after being repeatedly told by respondent of the alleged progress in their case, grievants' requested that respondent return their file. They subsequently retained respondent's ex-partner as their new attorney and discovered that respondent had done little to advance their claims. After numerous requests, grievants finally received an incomplete file from respondent in early 1988.

In his answer and at the ethics hearing, respondent denied any wrongdoing. He testified that grievants' criminal attorneys informed him that a tort claim notice had been filed against the various government entities. Respondent said he later discovered that no such notice had been filed and that he advised grievants that a motion to the court was required for an extension of time to file the claim. Respondent testified that he made efforts to file the motion prior to the filing of the ethics complaint. He claimed that the delay in returning grievants' file was due to the dissolution of his law partnership.

The hearing panel concluded that respondent was guilty of gross negligence contrary to RPC 1.1(a), failed to act with reasonable diligence contrary to RPC 1.3, and failed to adequately communicate with his clients contrary to RPC 1.4.

The panel recommended that respondent be privately reprimanded.[1]

DRB 89-104

Wallach Matter (IV-86-17E)

In early 1983, grievants, Marcia and Allen Wallach, purchased a vehicle from an automobile dealership but were unable to secure title to the vehicle. The dealership subsequently went bankrupt and was the subject of criminal proceedings as a result of fraudulent dealings with grievants and others. Grievants paid respondent $ 150 to obtain title to their vehicle.

In June 1983, respondent filed suit against the dealership and made several court appearances on grievants' behalf. Respondent also wrote several letters informing grievants of progress in the matter. In August 1985, respondent obtained a court order which secured grievants' title to their vehicle.

At the ethics hearing, grievant, Marcia Wallach, testified that she had difficulty contacting respondent by telephone in 1984 and that he did not address numerous problems that grievants were experiencing in the case.

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1 The two ethics charges that comprised District Docket No. IV-88-10E were dismissed by the Hearing Panel.

The Hearing Panel concluded that there was no clear and convincing evidence that respondent either failed to act diligently or to adequately communicate with his clients.

Schiavo Matter (IV-87-15E)

In early 1983, grievant, Maria Schiavo, requested that respondent represent her in a Worker's Compensation claim. The claim arose from a December 1982 accident at her place of employment.

In connection with the claim, grievant returned a fact sheet pursuant to respondent's letter dated February 2, 1983. This letter was prefaced with "Re: Workmen's Compensation." On May 23, 1983, respondent informed the Division of Employment and Disability Insurance by letter that grievant "has asked that I proceed on her behalf with regard to [a] disability claim that she has filed with your office."

On October 3, 1983, respondent wrote to grievant requesting that she contact him and up-date her file. Respondent subsequently assured grievant that her claim was proceeding smoothly. On March 14, 1985, respondent again wrote to grievant stating that her "file has come up for review and a review of the file shows that you supplied us with Certification of Contested Worker's Compensation Claim". Respondent requested that grievant provide him with a claim petition. The letter was prefaced with "Re: Schiavo vs. N.J. Casino Control Comm."

In early 1986, grievant telephoned respondent's office and was advised by a secretary that respondent no longer represented her. Grievant then contacted another attorney. Respondent subsequently failed to reply to letters sent by grievant's new attorney in September and October 1986, requesting information.

Respondent, in his answer and at the ethics hearing, claimed that he did not agree to represent grievant in the Worker's Compensation claim and that his representation was limited to the pursuit of a disability claim. Grievant was not native to this country and had difficulty speaking and understanding English. She testified that she completely trusted respondent and understood that he was representing her in the Workers' Compensation claim.

The Hearing Panel concluded that respondent had not diligently pursued the Worker's Compensation claim which resulted in the claim being time-barred. The panel concluded that respondent failed to act diligently contrary to RPC 1.3, failed to communicate the limits of his representation to grievant contrary to RPC 1.2(c), and failed to keep his client reasonably informed contrary to RPC 1.4.

Garchinsky Matter (IV-87-21E)

In July 1983, grievant, John Garchinsky, paid respondent $ 300 to pursue a claim against an airline for misplacing his baggage. Grievant also discussed two other matters with respondent regarding the collection of a promissory note and

a malpractice action against an accounting firm. Respondent subsequently referred grievant to a Pennsylvania attorney regarding these two matters.

On May 9, 1984, grievant wrote to respondent stating that he had met with the Pennsylvania attorney and that respondent had placed grievant in financial jeopardy regarding the promissory note and malpractice matters. Grievant was under the impression that respondent was still representing him in these matters. Grievant also noted that respondent had assured him that the airline matter was "taken care of."

In October 1984, respondent prepared a complaint against the airline and forwarded a copy to grievant. In November 1984, grievant sent another $ 300 payment to respondent. Grievant believed that this payment was for the purpose of filing the complaint. The complaint, however, was never filed by respondent.

Respondent, in his answer and at the ethics hearing, claimed that he sent grievant a memorandum on December 17, 1984. This memorandum advised grievant that venue in the airline matter should lie in Pennsylvania, where grievant resided. The memorandum further advised that a complaint should be filed in both state and federal court and that the international nature of the complaint was beyond the capabilities of respondent's office. Grievant denied that he ever received this memorandum, but acknowledged that respondent discussed the substance of the memoradum with him.

The Hearing Panel noted that the memorandum had a date of 12/17/84 on the first page and a conflicting date of 12/17/87 on the second page. The panel found that the discrepancy in dates coupled with grievant's denial that he received the memorandum raised serious doubts as to its validity. The panel concluded that respondent advised grievant that a complaint was filed, when it was not. The panel did not find clear and convincing evidence that respondent was guilty of any unethical conduct regarding the promissory note and malpractice matters. The panel concluded that respondent failed to adequately communicate with his client with regard to the airline matter, contrary to RPC 1.4.

The panel recommended that respondent be publicly disciplined for his unethical conduct in this and the Schiavo matter.

CONCLUSION AND RECOMMENDATION

Upon a review of the full record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

In the Schiavo and Dadura-Shaw matters, respondent failed to act with reasonable diligence contrary to RPC 1.3. Respondent also failed to communicate adequately with his clients in these matters and in the Garchinsky matter, contrary to RPC 1.4. In Schiavo, respondent failed to pursue

a Worker's Compensation claim on behalf of his client which resulted in the claim being barred by the statute of limitations. His correspondence to his client, who had difficulty with the English language, led her to assume that he was representing her in the Workers' Compensation claim and that his representation was not limited to a disability claim, as respondent maintained. In Garchinsky, respondent gave grievant the incorrect impression that a complaint had been filed. Similarly, in Dadura-Shaw, respondent, over a two-year period from 1985 until 1987, led grievants to believe that there was progress in obtaining their stolen jewelry. Grievants' claims against the township and state were ultimately time-barred because of respondent's inaction. Respondent also failed to return grievant's complete file. The degree of respondent's inaction in this matter coupled with the adverse and foreseeable consequences to his clients makes it clear that he acted with gross negligence contrary to RPC 1.1(a).

Respondent's unethical behavior was not confined to lack of diligence and failure to communicate with clients. In the Scipani matter, respondent shared a legal fee with a non-attorney contrary to DR 3-102(a). Respondent gave part of his seven percent fee to a realty company. The seven percent fee was clearly dilineated in the contigent fee agreements as an "attorneys' fee".

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 Tuso, 104 N.J. 59, 65 (1986 .

This record is replete with mitigating factors. Respondent, who was admitted to the New Jersey Bar in 1976, has not previously been found guilty of unethical conduct. For a period of at least six months, in late 1983 and early 1984, respondent was confined to his home because of a serious injury to his lungs and ribs. During this time, respondent's wife and law partner were left in charge of the law practice. Unfortunately, respondent later learned that some matters were not handled properly. In addition, respondent's ex-partner initially represented him in the ethics proceedings until respondent discovered that his ex-partner and his wife were having an affair. Respondent's wife subsequently divorced him and married the ex-partner. Finally, respondent filed for bankruptcy after another attorney allegedly embezzled money from respondent's office.

Unethical conduct similar to respondent's has usually resulted in a term of suspension. See e.g., Matter of Schwartz, 91 N.J. 421 (1982)(attorney with previous unblemished record suspended for three months for gross negligence and failure to advise client of withdrawal). This Board recognizes the considerable mitigating circumstances present in this case. Nevertheless, the injury that respondent wrought upon his clients cannot be ignored. Accordingly, the Board unanmously recommends that respondent be publicly reprimanded. Absent the mitigating circumstances, the Board would have recommended a term of suspension.

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

Dated: 11/7/88

Raymond R. Trombadore
Chair
Disciplinary Review Board