

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 85-430,
86-117, 86-229, and 88-242

IN THE MATTER OF :
:
JOHN A. ESPOSITO :
:
AN ATTORNEY-AT-LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 17, 1988

Decided: June 6, 1989

Edward Heyd, Esq., appeared on behalf of the District VI Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter is before the Board based upon two recommendations for private reprimand (85-430 and 86-117) and two presentments (86-229 and 88-242) filed by the District VI (Hudson County) Ethics Committee.

The respondent was admitted to practice law in New Jersey in 1957. On May 8, 1984, the respondent received a six-month suspension for failing to pay employee taxes. See Matter of Esposito, 96 N.J. 122 (1984). As of the date of this decision, the respondent has not petitioned for reinstatement. The matters that follow were heard by the ethics committee subsequent to the respondent's suspension.

DRB 85-430THE RIVERA MATTER

On July 3, 1976, Gilberto and Olimpia Rivera were involved in an automobile accident. Later that year, the Riveras retained respondent to represent them in connection with injuries which both had received as a result of that accident. The respondent referred the Riveras to several physicians for treatment and filed suit on behalf of Mrs. Rivera. This action was ultimately dismissed because of the respondent's failure to observe proper procedure.

In 1980, Mr. Rivera contacted the respondent regarding the status of their case. The respondent told Mr. Rivera that the case was pending and that he would assist the Riveras with his own funds until their case was resolved. Over the next several years, the respondent made payments to the Riveras totaling almost \$80,000.

The respondent, at the ethics hearing, admitted that the statute of limitations had run on the Rivera claim. He had no recollection of the Rivera suit or of its ultimate dismissal. He explained he did not intend to deceive the Riveras by telling them that their case was still pending when he knew it was not, and only meant to allay their fears. Because he knew that the statute of limitations had run, he intended to make restitution to the Riveras. The respondent admitted his wrongdoing and

agreed to comply with a future settlement, as determined by an independent panel.

The hearing panel report found that the respondent did not "process the [Rivera] claim with due diligence" and that he "misled" the Riveras. Because of the respondent's good faith attempts to minimize the damage to the Riveras, the panel recommended he receive a private reprimand.

DRB 86-117

THE LOPEZ MATTER

In May 1981, William Lopez retained the respondent to institute divorce proceedings on his behalf. Thereafter, the respondent repeatedly assured Lopez of the satisfactory progress of his divorce case.

In August 1982, the respondent told Lopez that a default divorce judgment had been entered against him in January 1982. This judgment did not provide for equitable distribution. Lopez was left responsible for the debt incurred by him and his former wife, which included \$13,000 in credit card balances. The respondent told Lopez that he never received any communication regarding a divorce action against Lopez and, therefore, did not oppose the divorce judgment. The respondent promised him that he would look into the matter.

Lopez subsequently called the respondent several times while overseas from 1982 to 1984. The respondent told him that he was

working on the divorce case, as well as on two collection cases. Lopez returned in September 1984 and discovered that the respondent had been suspended from the practice of law.

The respondent failed to appear at the ethics hearing. Lopez testified that he paid the respondent \$1,500 to represent him in his divorce. In addition, Lopez previously requested the respondent to collect \$2,000 owed to him by a former employer and \$2,800 by a buyer of Lopez' automobile. The respondent neither filed an action for divorce on Lopez's behalf nor took any action on the two collection matters.

The hearing panel concluded that the respondent failed to pursue the divorce matter and "constantly misinformed or misled" Lopez regarding the status of the case, in violation of DR 7-101 (representing a client zealously) and DR 1-101 (maintaining integrity and competence of the legal profession). In addition, the panel included the two collection matters as the "subject matter of our decision in terms of violations found against [respondent]."

DRB 86-229

THE SAVOIA MATTER

On May 13, 1980, Gilbert Savoia was injured at his place of employment. Soon thereafter he retained the respondent to pursue a workers' compensation claim on his behalf. Later in 1980, when Savoia's injuries were aggravated by the nature of his work, the

respondent referred him to a physician for evaluation. On November 19, 1980, the respondent filed two claims on Savoia's behalf.

Although pre-trial conferences were scheduled in 1981 and 1982, the respondent adjourned them because of insufficient medical reports. The claims were finally dismissed on January 5, 1983, for failure to answer interrogatories and failure to comply with a petition for medical information.

Savoia was able to reach the respondent in February 1983 after several unsuccessful attempts, and was told that further medical reports were necessary to support the two claims. The respondent did not inform Savoia that the claims had been dismissed.

In late 1983 or early 1984, Savoia contacted a new attorney to handle his case because of the lack of communication with the respondent and the length of time that had passed without any resolution of his claims. The new attorney discovered that the two claims had been dismissed. His attempts to reinstate the claims were unsuccessful. He finally referred the matter to a third attorney.

At the ethics hearing, the respondent testified he did not tell Savoia the claims were dismissed because he felt they could easily be reinstated. He did not want to concern Savoia.

The hearing panel concluded that respondent was "not diligent in the representation of Mr. Savoia" and "misrepresented the status of the case to the client." The panel recommended

that respondent be publicly reprimanded.

DRB 88-242

I - THE BASULTO MATTER

In September 1975, the respondent represented William Adamo in the sale of his building located in Union City, New Jersey. The buyers subsequently defaulted on the mortgage payments. After consultation with the respondent, Adamo repossessed the property and resumed the collection of rent from tenants who resided in the building.

In December 1981, Jorge Basulto agreed to purchase the building from Adamo. Both Basulto and Adamo were represented by the respondent at the closing on January 23, 1982. The respondent failed to inform Basulto that Adamo had previously sold the property and did not hold title thereto. In addition, the respondent failed to disclose to either party the existence of his conflict of interest with each client in relation to the others and did not obtain informed consents for representation of both parties.

After the closing, Basulto began making improvements on the buildings. He discovered that a deed had never been registered in his name. The respondent told Basulto that he would attempt to resolve the deed problem. In August 1982, the respondent referred the matter to another attorney who unsuccessfully attempted to institute foreclosure proceedings against the previous purchasers.

At the ethics hearing, the respondent testified that he tried to do Basulto and Adamo a favor in representing both of them, that he did not receive any legal fees from either party, that he informed both parties about the circumstances of the transaction, and that the parties consented to his representation.

The hearing panel concluded that the respondent "did not make the full disclosure mandated by RPC 1.7(a)(2)" and under the circumstances "could not reasonably believe that his representation would not adversely affect one of the parties", in violation of RPC 1.7(a)(1). The panel did not find respondent guilty of failure to pursue the foreclosure matter.

II - THE MILLAND MATTER

On June 21, 1982, the respondent filed suit on behalf of Emanuel Milland for injuries received by Milland in a July 1980 bicycle accident.

The Milland complaint was dismissed on March 11, 1980, for failure to answer interrogatories. The respondent did not move to reinstate the complaint. Ultimately, the statute of limitations ran.

In 1983, Milland contacted another attorney to file a claim in connection with a second accident in which he was involved. The attorney attempted to contact the respondent several times in hopes of obtaining relevant medical information as well as the file regarding the bicycle accident. The respondent finally told

the attorney that the complaint had been dismissed, but failed to provide either the file or the requested medical information. Thereafter, in September 1984, the attorney filed a malpractice action against the respondent on behalf of Milland. The respondent was served with the malpractice complaint in November 1984 and with an amended complaint in April 1985. He failed to file an answer to either complaint. In addition, the respondent failed to cooperate with his malpractice carrier which contributed to the denial of malpractice coverage.

Judgment in the malpractice action was ultimately entered against the respondent for \$3,890. He was then served with an order for discovery requiring him to appear at post-judgment proceedings. The respondent failed to comply with this order. The respondent also failed to comply with a subsequent order to show cause. On April 14, 1986, an order for the respondent's arrest was issued. The respondent finally settled the malpractice matter in May 1986 for \$4,000.

At the ethics hearing, respondent testified that he was in the process of turning over his negligence cases to another attorney when the mishandling of the Milland matter occurred. He claimed that he told both Milland and his new attorney that the negligence complaint had been dismissed for failure to answer interrogatories and that the statute of limitations had run. In addition, he claimed that he told the attorney that he could not locate Milland's file. Finally, the respondent admitted his "negative behavior" throughout the entire matter which he related

to his heavy workload.

The hearing panel concluded that the respondent violated RPC 1.4(a) because he failed to adequately communicate with Milland's attorney. In addition, the panel concluded that the respondent violated RPC 8.4(d) by his failure to comply with the order for discovery. The panel did not find the respondent guilty of gross negligence, in violation of RPC 1.1(a). Finally, the panel considered this matter in conjunction with the Savoia and Basulto matters, but did not find a pattern of neglect. The panel took into account the respondent's extraordinary workload and the relatively minor number of negligent acts.

III - THE PEREZ-GUEVARA MATTER

On January 16, 1986, a malpractice complaint was filed against the respondent by Roger and Zenaida Guevara. The complaint alleged that the Guevaras retained the respondent in 1983 to represent them in the purchase of property located in Narrowsburg, New York, and that he negligently failed to record the deed and mortgage for the property. In addition, the complaint alleged that on June 22, 1984, a fire destroyed the property and, because of the respondent's negligence, the Guevaras were forced to spend additional money in order to prove ownership for indemnification purposes. In October 1986, a default judgment was entered against the respondent.

At the ethics hearing, respondent testified that a former client, Candelaris Perez, approached him regarding the sale of

the Narrowsburg property to the Guevaras. Perez insisted that the respondent handle the transaction. The respondent, as a favor to Perez, drew up a mortgage contract whereby the Guevaras would pay Perez \$1,000 as a downpayment and make subsequent monthly payments directly to Perez for a total of \$44,000. Given the unusual nature of this transaction, the respondent did not record the deed or mortgage until the Guevaras showed faithful performance under the mortgage. The respondent testified that he intended to protect Perez from an expensive foreclosure procedure if the Guevaras failed to make the required mortgage payments. In addition, the respondent testified that he never represented the Guevaras and did not receive any legal fees from either Perez or the Guevaras.

The hearing panel concluded that the respondent did not owe any duty to the Guevaras and therefore did not violate RPC 1.7. In addition, the panel found that respondent did not violate RPC 8.4 when he failed to file an answer to the malpractice complaint. The panel concluded that "the burden of proof required to sustain the grievance was not met."

The hearing panel recommended that the respondent receive a public reprimand for his conduct in the Basulto, Milland and Perez-Guevara matters, but that no further suspension be imposed. The panel took into account respondent's cooperation and recognized that the matters involved acts of misjudgment and imprudence, not acts of venality. The panel also noted that the respondent did not profit from his mistakes and that he underwent

obvious mental and emotional anguish which resulted from a seven-day week and fifteen-hour-per-day work schedule.

CONCLUSION AND RECOMMENDATION

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

In the Rivera, Lopez, and Savoia matters, the respondent failed to represent the clients zealously, contrary to DR 7-101(A)(1)(2) and (3), misrepresented the status of cases to his clients, contrary to DR 1-102(A)(4), and engaged in conduct that adversely reflected on his fitness to practice law, contrary to DR 1-102(A)(6). In the Rivera matter, the respondent admitted that he allowed the statute of limitations to run and that he told the clients that their claim was still pending. In the Lopez matter, the respondent failed to file a divorce action and then allowed a default divorce judgment to be entered against his client. In addition, he misled Lopez into believing that work was being done on the divorce matter as well as on the two collection matters when, in fact, nothing had been done. In the Savoia matter, the respondent failed to answer interrogatories and comply with a petition for medical information, thereby causing the claims to be dismissed. The respondent misled Savoia about the status of his case and also failed to inform him of its dismissal.

When the respondent was retained by his clients, he owed them a duty to pursue their respective interests diligently. See Matter of Smith, 101 N.J. 568, 571 (1986); Matter of Schwartz, 99 N.J. 510, 518 (1985); In re Goldstaub, 90 N.J. 1, 5 (1982). The record is clear that the respondent disregarded his obligations to his clients. He compounded his failure to pursue his clients' interests diligently by misrepresenting the status of their cases. He had a duty to keep clients "completely and accurately informed of their legal matters." See Matter of Stein, 97 N.J. 550, 563 (1984). In Rivera and Savoia, respondent never told his clients about the dismissals of their complaints. See In re Rosenthal, 90 N.J. 12, 16 (1982) (an attorney has the obligation to inform the client of an imminent dismissal). Finally, the respondent's lack of diligence and his misrepresentations adversely reflected on his fitness to practice law. See Matter of Gill, 114 N.J. 246, 257 (1989).

The respondent's unethical behavior was not confined to lack of diligence and misrepresentations to clients. In the Milland matter, the complaint was dismissed for failure to answer interrogatories. The respondent violated R.P.C. 1.4(a) by his failure to inform his client of the dismissal and that the statute of limitations had run. Moreover, he failed to comply with two post-judgment orders in the subsequent malpractice action, thereby violating R.P.C. 8.4(d). The respondent settled the malpractice matter only after an order for his arrest was issued.

The Board agrees with the committee's conclusion that the respondent created a conflict of interest in the Basulto matter when he represented both the buyer and the seller of real property, but disagrees that the Rules of Professional Conduct apply. Respondent's conduct occurred prior to September 1984, the effective date of the Rules of Professional Conduct. Hence, the Disciplinary Rules apply. Respondent's conduct violated DR 5-105.

Having determined that respondent's conduct was unethical, the Board must recommend the imposition of discipline which comports with the seriousness of the infractions, bearing in mind that 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 are therefore relevant and may be considered, including contrition and admission of wrongdoing. 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).

The Board finds a number of factors that mitigate respondent's unethical conduct. The respondent, a member of the New Jersey bar for over thirty years, admitted to most of the

ethics charges against him. It appears that none of the respondent's unethical activity was done with an intent to profit from or cheat his clients. Indeed, in one instance (the Rivera matter), the respondent paid his clients almost \$80,000 because he realized that the statute of limitations precluded them from pursuing their claim. Moreover, the respondent's unethical conduct appeared to be the direct result of a heavy seven-day week, fifteen-hour-a-day work schedule. As the presenter indicated at the Board hearing, "[respondent] was just working too hard. And you could see that from being in his office. It was like a zoo I think because of [respondent's] linguistic abilities that the people that came to him were going to more than a lawyer. And maybe [respondent] was acting more than a lawyer" (BT4,5).¹ The presenter also alluded to the respondent's emotional problems seemingly caused by his enormous workload.

The Board notes that the respondent was suspended for six months in 1984 but has not applied for reinstatement. Upon consideration of all the relevant facts, the Board unanimously recommends that the respondent's suspension since May 1984 be deemed sufficient discipline. See Matter of Gill, supra, 114 N.J. 246 (1989) (attorney's suspension from January 1984 until 1989 was considered sufficient discipline for deceitful conduct, failure to seek clients' lawful objectives, and egregious pattern of neglect). In addition, the Board recommends that, upon

¹BT denotes the transcript of the November 17, 1988 Board hearing.

reinstatement, the respondent practice law under a one-year proctorship and show proof of successful completion of the Skills and Methods and Professional Responsibility courses.

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

Dated: _____

6/6/89



Raymond R. Trombadore
Chair
Disciplinary Review Board