SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. 94-393 and
95-076

IN THE MATTER OF

ANTHONY F. CARRACINO,

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: April 19, 1995

Decided: August 11, 1995

Anthony M. Campisano appeared on behalf of the District VIII Ethics Committee.

Respondent appeared pro se.

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

These matters were before the Board based upon two recommendations for private reprimand/admonition filed by the District VIII Ethics Committee (DEC). The Board considered the matter under Docket No. DRB 94-393, the Herrera matter, at its December 21, 1994 meeting, at which time it determined to hear the matter pursuant to R. 1:20-4(f)(2). The complaint charged respondent with the following violations: RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate), RPC 4.1(a) making a false statement of fact), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The matters under Docket No. DRB 95-076 had not previously been reviewed by the Board. The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3, RPC 1.4(a) and

RPC 8.1(b) (failure to cooperate with the DEC) in the Fierro matter and a violation of RPC 8.1(b) in the Ruffino matter.

Respondent was admitted to the practice of law in New Jersey in 1982. He currently maintains an office in Woodbridge, Middlesex County. He has no history of discipline.

Docket No. DRB 94-393

The Herrera Matter (District Docket No. VIII-93-030E)

On November 8, 1990, Tullio Herrera retained respondent on a contingent fee basis to represent him in connection with a dental malpractice action. The alleged malpractice occurred on October 2, 1989. Following their initial meeting, Mr. Herrera received no communication from respondent until sometime in 1992, despite his repeated attempts to reach respondent via telephone and in person. At that time, Mr. Herrera met with respondent to discuss a potential lawsuit against Mr. Herrera's employer. During that meeting as well as two or three subsequent meetings about the employment action, there was some discussion of the dental malpractice case. Respondent informed Mr. Herrera that he had misplaced the file (which was not located until late 1992), but apparently led Mr. Herrera to believe that the case was proceeding apace. In fact, no complaint had been filed and the statute of limitations had run.

Respondent denied having informed Mr. Herrera that a complaint had been filed. The record is not clear, however, as to what exactly respondent told him. Respondent stated that he spoke with

an expert about Mr. Herrera's claim and that the expert did not think it was a strong case. Respondent testified that he did not provide that information to Mr. Herrera until their last meeting, in early 1993.

When Mr. Herrera became concerned about respondent's lack of communication with him, in February 1993 he consulted with another attorney, Alan Cosner, Esq. (Mr. Cosner had previously represented Mr. Herrera in an unrelated matter.) On February 25, 1993, Mr. Cosner telephoned respondent. During that conversation, respondent told Mr. Cosner that he had filed a complaint for malpractice against the dentist. By letter dated February 26, 1993, Mr. Cosner confirmed that discussion with respondent. Mr. Cosner further stated that Mr. Herrera had asked him to take over the representation and requested that respondent prepare a copy of his file for him. Mr. Cosner never received the file.

Mr. Cosner made several subsequent attempts to contact respondent via telephone, to no avail. Accordingly, on March 18, 1993, Mr. Cosner wrote to the dentist and asked for a copy of the complaint and further asked for the name of the attorney representing him. His letter contained a "B. PS." to respondent, stating that Mr. Cosner had taken the step of contacting the dentist because of respondent's failure to communicate. The letter further stated that, if the dentist provided the complaint, Mr. Cosner expected respondent to forward the remainder of the file; if the complaint had not been filed, he expected respondent to "level" with him.

By letter dated March 20, 1993, the dentist replied to Mr. Cosner's inquiry, informing him that respondent had not filed a complaint against him. After receipt of the dentist's letter, Mr. Cosner again telephoned respondent and confronted him with that information. During that conversation, respondent admitted that, in fact, he had not filed a complaint in Mr. Herrera's behalf. Respondent also told Mr. Cosner that he had performed little work on the file and that, although he had spoken with a potential expert, he had not received a written report. Respondent indicated that he might be willing to compensate Mr. Herrera and further voiced his opinion that the case was not a particularly good one. (Respondent testified that he was referring to the value of the case for settlement purposes.) Mr. Cosner testified that respondent's tone during that conversation was apologetic. By letter dated March 31, 1993 to respondent, Mr. Cosner confirmed that conversation.

During his testimony before the DEC, respondent indicated that he had no explanation for his lie to Mr. Cosner. According to respondent, however, when he spoke with Mr. Cosner he thought there was some question as to when the statute of limitations would have run because the permanency of the injury would not have been apparent for up to one year. He stated, therefore, that he might not have missed the statute of limitations and that, if he had, it was not by a great deal of time.

A legal malpractice suit was subsequently filed against respondent by another law firm. That case was settled. (Mr.

Herrera also consulted with Mr. Cosner about the employment matter. Mr. Cosner referred Mr. Herrera to another attorney.)

In his answer, respondent admitted violations of RPC 1.4(a) and (b), RPC 4.1(a) and RPC 8.4(c). Although respondent did not specifically deny the alleged violation of RPC 1.3, he stated that he did not think that his client's claim was viable.

* * *

The DEC found that respondent violated RPC 1.3, in that he failed to act with reasonable diligence and promptness in representing Mr. Herrera. The DEC also found that respondent violated RPC 1.4, by failing to keep Mr. Herrera reasonably informed about the status of the claim, as well as RPC 4.1 and RPC 8.4(c), based upon respondent's statement to Mr. Cosner that a complaint had been filed. What, specifically, respondent said to Mr. Herrera in this regard, is not clear. The DEC's report stated that "[t]here is no evidence to indicate that Mr. Carracino in fact had advised Mr. Herrera that a complaint had been filed although there is sufficient evidence from which one can conclude that Mr. Herrera felt that his case was being handled properly by Mr. Carracino" (DEC report at 8). (Mr. Herrera did, however, clearly state in his testimony that respondent had told him that he had "filed" the case. T3/16/94 5, 12.)

The DEC noted that this was an isolated case and that respondent ultimately admitted that he had failed to file the complaint. The DEC considered that respondent settled the

malpractice claim against him and admitted that he had no explanation for his lie to Mr. Cosner.

Docket No. DRB 95-076

The Fierro Matter (District Docket No. VIII-94-031)

On February 6, 1990, George Fierro injured his arm in the course of his employment at the Oyster Point Hotel. Mr. Fierro, a waiter in the hotel restaurant, intervened in an altercation between a patron and the restaurant manager. Mr. Fierro received medical treatment and physical therapy through his employer's worker's compensation policy. By letter dated February 6, 1991, the insurer, CNA, informed Mr. Fierro that he had to undergo an independent medical examination.

On February 8, 1991, Mr. Fierro retained respondent, and signed a contingent fee agreement and authorizations for the release of medical and employment records. Mr. Fierro and respondent agreed that respondent was retained to represent Mr. Fierro in a municipal court matter arising out of the February 6, 1990 incident. A dispute arose, however, as to whether respondent was also retained to pursue a worker's compensation claim.

Prior to being retained by Mr. Fierro, respondent had established a partnership with Robert Dato, Esq., which ended in April or May 1991. Mr. Fierro's father, Frank Fierro, had been a client of Mr. Dato. At some point, Mr. Dato turned his clients, including Frank Fierro, over to respondent. It was Frank Fierro who introduced respondent to his son. At the initial meeting

between Mr. Fierro and respondent, which Frank Fierro also attended, they discussed possible options on how to proceed. Respondent expressed his opinion that they had a good case. According to Mr. Fierro, respondent planned to pursue a worker's compensation claim and suggested that they also file a municipal court proceeding for assault against the patron, which might later be utilized in a worker's compensation claim against CNA. Mr. Fierro viewed the municipal court proceeding as "stage one" of the worker's compensation claim.

Respondent agreed to take on the representation in the municipal court matter for $500. Although the record is unclear as to when, it was apparently agreed between Mr. Fierro and respondent that the patron did not have sufficient assets to make a third-party claim worth pursuing. (The record contains a complaint in a civil proceeding initiated by the patron against Mr. Fierro, in which respondent represented Mr. Fierro. That complaint appears to have been dismissed.)

The municipal court proceeding was held on March 28, 1991. The patron was found guilty, but of a lesser offense than the original assault charge. According to Mr. Fierro, respondent told him that they could still use the outcome of the municipal court matter. Respondent then instructed Mr. Fierro to have the evaluation by CNA's doctor and assured Mr. Fierro that he would contact him.

Mr. Fierro stated that, after the March 28, 1991 proceeding, he received no correspondence from and had no personal contact with

respondent. He made numerous attempts to contact respondent by telephone and was only able to leave messages on his answering machine or speak with an individual who was evidently respondent's paralegal. Mr. Fierro proceeded with the examination by CNA's doctor, as also instructed by the paralegal.

During the time Mr. Fierro was attempting to contact respondent, his father was still represented by respondent. Frank Fierro testified that Mr. Fierro had told him several times of his difficulty in contacting respondent, stating that most of his conversations were with respondent's paralegal. At Mr. Fierro's request, Frank Fierro asked respondent, on more than one occasion, about the status of his son's claim. On at least one occasion, Frank Fierro told respondent that his son had been unable to contact him. Respondent assured Frank Fierro that the case was proceeding apace. Frank Fierro relayed that information to his son.

Contrary to the Fierros' testimony, respondent testified that he never agreed to pursue a worker's compensation claim on behalf of Mr. Fierro. Although the record is unclear on this score, respondent indicated that it was his belief that a claim based on Mr. Fierro's injury was specifically precluded by the worker's compensation statute. He went on to explain, however, that he had told Mr. Fierro that, if the injury turned out to be sufficiently severe, they might be able to overcome the statute's prohibition. Respondent told Mr. Fierro that, in that event, he would represent him. Respondent never obtained Mr. Fierro's medical reports.

Instead, he relied on the latter's information to evaluate the case.

With regard to the documents in his file, respondent pointed out that the contingent fee agreement Mr. Fierro signed would not have been used in a worker's compensation matter. Respondent stated that he had been contemplating a third-party negligence suit. He also noted that he never had Mr. Fierro sign a worker's compensation claim petition.

There was some confusion in the record regarding respondent's former partner, Mr. Dato, and his possible possession of Mr. Fierro's file. Respondent contended that, when he left the building where his office with Mr. Dato had been located, there was some difficulty with the files. (The situation was later apparently aggravated because respondent had entered into another short-lived partnership with another attorney, who also had some of the files.) According to respondent, he advised both Fierros that he did not have a file in this matter and that Mr. Dato might have it. Specifically, respondent testified that he spoke with Mr. Fierro in late 1992. When the latter asked about his case, respondent replied:

> I told him I don't have the file is what I said, I don't have the file. Where's the file I think he said or who has it or whatever, and I said I don't have the compensation file, I don't have an open file.
> [T12/19/94 97]

Both George Fierro and Frank Fierro denied that respondent ever indicated that Mr. Dato could have had possession of the file. The record is unclear as to what would have been in this file

pertaining to the worker's compensation matter, clearly the subject of the Fierros' inquiries, if respondent had never filed the claim.

* * *

Mr. Fierro received a letter dated May 11, 1993 from CNA informing him that no further medical treatment would be authorized and enclosing a settlement check. (Mr. Fierro did not cash the check.) After receipt of the letter and check, Mr. Fierro attempted to contact respondent, to no avail. In May 1993, Mr. Fierro contacted Ronald Rak, Esq. Mr. Rak does not handle worker's compensation matters and told Mr. Fierro that he would refer him to Jack Mandell, Esq. On August 18, 1993, after a meeting between Messrs. Rak, Mandell and Fierro, Mr. Rak attempted to contact respondent. During that call, Mr. Fierro spoke with respondent's secretary or paralegal, stating that it was "very urgent" that he speak with respondent. Although Mr. Rak stated that Mr. Fierro never told him whether respondent replied to that message, it may be inferred that he did not. Subsequently, on October 8, 1993, after Mr. Mandell informed Mr. Rak that respondent had failed to reply to his letters requesting information, Mr. Rak made another attempt to communicate with respondent, again to no avail. By letter dated October 8, 1993, Mr. Mandell informed Mr. Rak that respondent had never replied to his inquiries and that he, Mr. Mandell, had learned from the Department of Labor, Division of Worker's Compensation, that no claim had been filed in Mr. Fierro's behalf. Mr. Mandell further suggested that Mr. Fierro meet with him to execute the proper documents to initiate a worker's

compensation claim. (Contrarily, respondent contended that he spoke with Mr. Mandell in October 1993, at which time he informed him that he did not have a worker's compensation file.) After receiving that letter, Mr. Rak called Mr. Mandell, who informed Mr. Rak that he still had no reply from respondent and that the statute of limitations had run. Thereafter, Mr. Rak accepted a $1,400 settlement from CNA on Mr. Fierro's behalf.

Mr. Fierro's file has never been turned over to him or Messrs. Rak or Mandell.

Failure to cooperate with the DEC

Testimony was offered at the DEC hearing by Anthony M. Campisano, the DEC investigator/presenter regarding respondent's failure to comply with the DEC's requests for information in the Fierro matter and in another matter arising from a grievance, filed on November 20, 1993, by Donna Marie Ruffino (District Docket No. VIII-94-013).

By letters dated December 2, 1993 and January 10, 1994, the DEC secretary asked respondent to reply to the allegations in the Ruffino grievance. Respondent failed to reply. In February 1994, the DEC secretary forwarded the Ruffino grievance to Mr. Campisano. Mr. Campisano wrote to respondent on February 8, April 4, and April 18, 1994. (In the April 18, 1994 letter, respondent was informed that his failure to reply was a possible violation of the Rules of Professional Conduct.) Respondent did not provide a written reply to any of these letters. Respondent and Mr. Campisano did,

however, have a telephone conversation in April 1994. During that conversation, respondent explained that he had been unable to contact Ms. Ruffino and that he had, thus, been unable to pursue her case. Mr. Campisano also expressed his inability to contact Ms. Ruffino. According to Mr. Campisano's testimony, he instructed respondent to put this explanation in writing. Mr. Campisano told respondent that, if his explanation was true and given Mr. Campisano's own inability to contact Ms. Ruffino, it was likely that the matter would be dismissed.

Respondent did not furnish a written reply to the Ruffino grievance. Respondent explained that Mr. Campisano had previously contacted him regarding an earlier grievance, the Herr matter. During several telephone conversations with Mr. Campisano regarding the Herr matter, respondent had admitted the misconduct in that matter. Mr. Campisano had told him that he, therefore, did not have to admit his misconduct in writing. Respondent contended that, despite Mr. Campisano's instruction in Ruffino to send a writing, he did not appreciate the need to reply in writing because the Herr matter had been concluded orally. Further, in his answer, respondent enumerated a number of factors and events in his life at that time, which apparently contributed to his inability to comply with Mr. Campisano's instructions.

With regard to the Fierro matter, Mr. Campisano sent respondent letters dated April 18, and June 10, 1994, requesting that he reply to the allegations. (The June 10, 1994 letter also pertained to the Ruffino matter and to a matter filed by Frank

Fierro.) Respondent did not reply to Mr. Campisano's letter. Respondent contended that he was unable to locate the Fierro file – which had been left in Mr. Dato's building when respondent left – until approximately June 1994 and that he felt it was important to have the file before he replied to the allegations. Respondent added that the summer of 1994 had been difficult for him financially.

* * *

The DEC determined that Mr. Fierro had retained respondent for both the municipal court and worker's compensation matters and that respondent had failed to pursue the latter. The DEC found a violation of RPC 1.3, RPC 1.4(a) and RPC 8.1(b).

The DEC did not find clear and convincing evidence of a violation of RPC 1.1(a) in the Fierro matter or of a violation of RPC 8.1(b) in the Ruffino matter.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusions of the DEC that respondent was guilty of unethical conduct are fully supported by clear and convincing evidence.

The DEC found respondent guilty of a violation of RPC 1.3, RPC 1.4, RPC 4.1 and RPC 8.4(c) in the Herrera matter and RPC 1.3, RPC 1.4(a) and RPC 8.1(b) in the Fierro matter. The Board cannot, however, agree with the latter violation. Although respondent did

not cooperate with the investigator, he filed an answer and cooperated at the DEC hearing. Accordingly, his conduct in this regard did not rise to the level requiring discipline.

Respondent's violations in the Herrera matter are essentially undisputed, respondent having admitted the bulk of his misconduct.

In the Fierro matter, the presenter contended that an examination of respondent's file would lead to the conclusion that he was representing Mr. Fierro on the worker's compensation matter or, at a minimum, something more than the municipal court proceeding. Regardless of the conclusion that may be drawn now by examining those documents, the real issue is the conclusion that could have been drawn by Mr. Fierro at the time. There is no question that he believed that respondent was pursuing a worker's compensation claim in his behalf. Given that Mr. Fierro kept telephoning respondent after the municipal court and civil matters had both been resolved, respondent should have known that Mr. Fierro believed that there was a worker's compensation matter still pending. Yet, regardless of whether respondent was representing Mr. Fierro or not, the fact remains that respondent took no steps to resolve his client's confusion.

Respondent's contention that he told Mr. Fierro and Frank Fierro to contact Mr. Dato because he might have had Mr. Fierro's file is specious. His argument would make some sense if he were talking about a closed file that he had left behind when his partnership with Mr. Dato ended. This matter, however, was not closed, at least in the mind of Mr. Fierro. Even assuming that

respondent's testimony was truthful, that is, that he had not undertaken the representation of the worker's compensation matter, his client was laboring under the impression that he had.

Whether respondent was guilty of gross neglect and/or a lack of diligence in this matter came down to a question of credibility of the witnesses. The reasoning of the DEC, which was able to judge the demeanor of the parties and found respondent guilty of misconduct, was persuasive. Further, if respondent's contention was true, i.e., that he was not retained for the worker's compensation matter, then all he had to do was to send a simple letter to Mr. Fierro so informing him. His failure to do so brought his entire testimony into question and also evidenced his serious failure to communicate with his client.

The DEC recommended the imposition of an admonition in each of these matters. Given respondent's conduct, however, that discipline is clearly insufficient. Respondent's misrepresentation to Mr. Herrera about the status of his malpractice case and/or his misrepresentation that he was pursuing a worker's compensation claim on behalf on Mr. Fierro warrant a reprimand. See In re Kasdan, 115 N.J. 472 (1989). The bulk of respondent's other violations, including his misrepresentation to Mr. Cosner that he had filed the complaint and his failure to reply to inquires from Mr. Rak and Mr. Mandell, does not require increased discipline. See, e.g., In re Wildstein, 138 N.J. 48 (1994) (where an attorney was reprimanded for gross neglect and failure to communicate in a series of three client matters) and In re Cervantes, 118 N.J. 557

(1990) (where an attorney was reprimanded for lack of diligence in two matters, failure to communicate in two matters and misrepresentation in one matter). Accordingly, the Board unanimously determined to reprimand respondent. One member did not participate.

The Board further determined that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 5/11/95 By: Raymond R. Trombadore
Chair
Disciplinary Review Board