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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-236

IN THE MATTER OF

JAMES F. CARNEY,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: November 1, 1993

Vincent J. Nuzzi appeared on behalf of the District V-C Ethics Committee

Harvey Weissbard appeared on behalf of respondent.

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

This disciplinary matter was before the Board based on a recommendation for public discipline filed by the District V-C Ethics Committee ("DEC"). The formal ethics complaint charged respondent with a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), for his failure to reveal to his client, Jacqueline E. Limite ("Grievant"), that the financial consultant to whom he referred grievant to advise her on how to invest a $495,000 net settlement was, in fact, respondent's wife.

Respondent, a sole practitioner in Roseland, was admitted to

the New Jersey bar in 1972. He is also a member of the New York bar. Products liability and third party workers' compensation matters are the core of his practice.

Grievant, a widow and the mother of three children, was referred to respondent by Terry R. Zuckerman, Esq., for whom grievant's sister worked as a secretary. Grievant retained respondent to file a wrongful death action in New York, after her husband was fatally injured in a hit-and-run accident in that state. After turning down a $15,000 settlement offer, respondent obtained a verdict on the liability aspect of the case, following a two-week trial in October 1988. According to respondent, it was a difficult case because it stemmed from a hit-and-run accident. Before the jury returned in ten days to resolve the damage issue, as is the practice in New York, respondent successfully negotiated a $695,000 settlement, with the possibility of an additional "underinsurance claim."

It is undeniable that respondent obtained an excellent result in behalf of grievant and her children. According to respondent, the limit on the insurance policy of one of the defendants, a small corporation, was $500,000. The company informed respondent that, if the jury returned a verdict in excess of $500,000, it would file for bankruptcy. In fact, the attorney for the corporation warned the insurance company that the latter would be held responsible for the excess judgment, if it refused to pay the $500,000. After successful negotiations, respondent was able to obtain the $500,000 sum and, in addition, $195,000 in interest, notwithstanding that

there is no pre-judgment interest rule in New York.

It is undisputed that grievant was satisfied with respondent's representation. The DEC, too, was "uniformly impressed with the manner in which Respondent handled the New York litigation." Hearing Panel Report at 2. It is respondent's conduct following the receipt of the settlement check that is the subject matter of these ethics proceedings.

* * *

On or about October 20, 1988, grievant executed a general release (Exhibit R-11). On October 25, 1988, respondent received the settlement check, which was then hand-delivered to grievant for endorsement and deposited in respondent's trust account. At this juncture, respondent's and grievant's testimony began to differ.

According to grievant, respondent had initially assured her that, once the check cleared, the settlement funds would be turned over to her. Not having heard from respondent three weeks later, grievant contacted his office, at which time she was informed by respondent's secretary that the funds had not been disbursed because the out-of-pocket expenses had not been computed. Two days later, respondent telephoned grievant at the restaurant where she worked as a bartender. According to grievant,

> [r]espondent told me he wanted me to meet with a financial consultant * * * [b]ecause he wanted to see to it that accounts were set up for my three children because the Courts were mandating this and that he as an officer of the court had to verify this; and he was suggesting that I meet with a Miss Joan Tucker because he had dealt with her in the past and he felt she was competent; and if I dealt with her he could make these verifications a whole lot faster and avoid any other red tape. If I dealt with anyone else he would involve a

whole lot of red tape. He would cut this red tape if I dealt with Joan Tucker.

[T4/12/1993 11-12]

Grievant testified that it was her clear understanding that her funds would be "held hostage," unless and until she met with Tucker.

Soon thereafter, Tucker telephoned respondent at her place of employment to schedule a meeting. At that time, grievant asked Tucker with which company she was affiliated. Tucker replied that she worked for Merrill Lynch. Grievant then inquired why it would be necessary for her to meet with Tucker, if grievant already had a financial consultant at the Merrill Lynch Wayne Branch, where she maintained accounts. Tucker retorted that she worked at the Short Hills Branch and that she could arrange to have grievant's accounts transferred to Short Hills. Believing that respondent would not release the settlement funds unless she went through the motions of consulting with Tucker, grievant consented to a meeting with Tucker on November 20, 1988, at grievant's place of employment.

According to grievant, "[b]efore we discussed anything I told her I was very annoyed, very irritated, and the only reason I was meeting with her was because that's the only way I could get my money from Mr. Carney." T4/12/1993 21. Grievant testified that, suddenly, Tucker's voice assumed a sympathetic tone. Tucker expressed her understanding of the difficulty in raising three children alone because she, too, was a single parent. Tucker did not disclose to grievant that she had been a single parent until her marriage to respondent, in 1981. At the meeting, grievant

continued, Tucker presented her with forms for her signature to accomplish the transfer of her accounts from Wayne to Short Hills. Grievant signed those forms. According to grievant, she informed Tucker that "[a]ll I want to do is get this done and I want the monies put into the accounts where it belongs." T4/12/1993 24. Grievant instructed Tucker to deposit $50,000 in each child's account and the balance in her account. Tucker ended the meeting by saying that she would prepare an investment proposal, which she would then submit to grievant.

Two days later, on November 30, 1988, Tucker telephoned grievant to inform her that the accounts had been opened and the settlement funds deposited therein. She explained to grievant that she had obtained a check directly from respondent's trust account. (According to Tucker, Merrill Lynch did not require the payee's endorsement on a check). Grievant and Tucker met again on December 12, 1988, at which time Tucker presented the investment proposal to grievant. Tucker gave a detailed explanation of the proposed portfolio, including a $50,000 investment in JMB Real Estate, a venture in Hawaii.

There is no dispute that grievant authorized Tucker to proceed with that particular investment. As to the remainder of the proposal, however, it was grievant's testimony that she had directed Tucker not to take any further action until grievant discussed the matter with her accountant. Grievant also informed Tucker that she would have to discuss with her insurance agent an insurance policy proposed by Tucker as a retirement plan.

According to grievant, Tucker countered that, in the interim, grievant could sign the application to "get the paperwork started;" should grievant decide not to proceed with the policy, the application could be torn up. Grievant agreed.

In late December 1988, Tucker was away on vacation. During that time, grievant began to receive trade notes from Merrill Lynch (Exhibits G-2A through L), showing the activity on investments that, at least according to grievant, she had not authorized. Shocked and angered, grievant telephoned the Short Hills branch on December 29, 1988, with the instruction that her accounts be transferred back to the Wayne branch. She also went to the Short Hills office to discuss the matter with two of Tucker's supervisors. She informed them that she had not authorized Tucker to make the investments. According to grievant, their reply was that her authorization was not required because they had acted as her agents. After inspecting the trade notes and expressing their opinion that the investments were sound, the supervisors advised grievant that the investments could be rescinded, if she so desired. Here, too, the evidence is conflicting. Tucker testified that grievant had been unmistakably advised that she had until the following day to exercise the option of cancelling the transactions, at no penalty to grievant. Grievant, however, denied that she had been given any time limitations within which to rescind the investments.

Sometime later, grievant contacted her financial consultant at the Wayne branch, requesting that he intercede in her behalf.

Through his effort, the investments were converted to cash, but not without a loss of $6,000 to grievant because of a change in the interest rates and because of early withdrawal penalties. Tucker's commission generated by the above investments totalled approximately $1,500.

It was not until one year later that grievant discovered that Tucker was respondent's wife, after she received a letter from Terry Zuckerman, apprising her of the relationship (Exhibit G-3).

Respondent, in turn, vigorously denied any nefarious motives on his part. He testified that, as the attorney for grievant and her children, he felt morally obligated to the estate to insure that the funds were not squandered. Although he acknowledged that, unlike New Jersey, New York does not have a procedure for the allocation of wrongful death recoveries, respondent explained that, nevertheless, he was genuinely concerned that the settlement funds might not be properly invested because grievant had no family members on whom to rely and, in fact, was surrounded by a "very unstable environment." In short, respondent believed that, as the attorney for grievant — "an unsophisticated client" — and her three infant children, he had a fiduciary obligation to withhold the settlement check until he was satisfied that the large sums of money recovered would not be quickly dissipated. He denied that he had held the settlement funds hostage. He testified that "[i]t never reached that point where [grievant] said give me my check or else." T4/12/1993 239. He also denied telling grievant that he was an "officer of the court." ("I never use terms like that").

T4/12/1993 217. Respondent recounted the exchange with grievant as follows:

> I remember saying something to the effect that I felt, based on my experience, that I definitely had a responsibility to make sure that these funds just didn't disappear and that they should be invested in some kind of a long-term account * * * * I specifically remember saying to her that I wasn't trying to say that I thought she was going to take the money or the kids wouldn't get the money. I just stated that it was my experience based on years of practice that what happens is if the money is not tied up there is always going to be a Tom, Dick, Bob or Harry or long-lost relative that shows up a week after you get your money and they are going to say, and it still happens all the time, can you lend me $10,000, and anybody that has a few hundred thousand they want to help a family member out.
>
> It's much harder to do, as I explained to her and I always explain, to say, look, the lawyer had me tie this money up. I can't lend you the money. And, in fact, that's what I recommended that she do. And I said to her, I work with a person named Joan Tucker at Merrill Lynch. I would like you to meet with her, sit down with her, let her go over some ideas for [sic] and you let me know what you think.
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> [T4/12/1993 217-218]

Respondent denied having any knowledge that grievant already had accounts at Merrill Lynch. Upon inquiry by the DEC, he explained that he had not asked grievant if she had a financial consultant because he had assumed that she did not. He conceded, however, that he had not disclosed to grievant that Joan Tucker was his wife:

> I had made the decision for whatever reason that I developed a personal relationship with Mrs. Limite over the couple weeks of the trial, for the period after that and for the period when we had meetings with Zuckerman, the meeting afterwards about what to do with the money, I made a conscious decision at that point that I didn't want to call in what I felt was a chip, a chip in the

sense that I felt it would be unseemly if I said to her, look, why don't you do me this favor. This is my wife, she needs the business. She's a financial consultant, why don't you go to ner.

To the contrary, what I wanted to do was, because the reason why I wanted my wife to do it, was because, it may sound like a cliché these days in politics and all that, but I can't think of any person that I would trust in terms of looking out for my client better than my wife. It wasn't a common practice and I just felt that it would be better for them to just meet, see how they hit it off and if they didn't, fine. If they did, then it would all naturally flow at some point is what my feeling was.

* * *

Part of it was because I wanted a decision to be made on a total professional relationship whether or not she was satisfied with the proposals given to her, whether or not she was satisfied with the background of my wife's credentials, all of those things rather than it be done, here's your check. I want you to take it over to Merrill Lynch because this is my wife.
[T4/12/1993 221-222, 241]

Asked at the DEC hearing whether he had considered reimbursing grievant for the $6,000 loss that she sustained, respondent replied that he had. He added, however, that he had not done so because, after the ethics complaint was filed, he feared that his action might be taken as a bribery. He gave less thought to compensating grievant for the $1,500 commission earned by Tucker because of his feeling that grievant had treated Tucker poorly.

Joan Tucker also testified at the DEC hearing. Her involvement with grievant began when respondent asked her to discuss investment options with grievant, expressing his fear that the monies might be quickly dissipated. After a three-hour meeting with grievant, Joan Tucker asked grievant if she felt comfortable

working with her. Grievant replied that she was. According to Tucker, grievant then said, "let's get this going and I'll sign the papers now," referring to applications for new accounts. T4/12/1993 137. Tucker denied that grievant had informed her, at that meeting, that she already had accounts at another Merrill Lynch office. She also denied that grievant had not authorized the investments. Tucker testified that, upon receiving the check from respondent, she informed grievant that

> I was going to divide it up and invest the money before I left on vacation. I did not want her to think that I just took the money, deposited it and then left for a good period of time. I wanted her to know that I took care of it and that I would proceed as she wanted me to proceed.
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> [T4/12/1993 144].

Tucker reiterated that the investments had been made in accordance with the proposal and with grievant's approval. Tucker testified that she understood that she had grievant's approval and that she would not have made the investments if she thought otherwise.

Tucker admitted that she had not revealed to grievant that she was respondent's wife. When asked why not, Tucker replied: I really didn't think about it. I didn't think it was an important thing. I was not aware that it could be a big question * * * * I didn't purposely not tell her." T4/12/1993 179.

Lastly, Tucker denied vigorously that grievant had divulged to her that she had consented to a meeting only to obtain the release of the settlement funds by respondent.

* * *

At the conclusion of the ethics hearing, the DEC found that respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)), when he failed to disclose to grievant that Tucker was his wife. The DEC recommended public discipline.

CONCLUSION AND RECOMMENDATION

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

It is unquestionable that respondent did not reveal to grievant that he was married to Tucker. The only question is whether respondent's intent was to deceive grievant or, as he contended, to allow grievant to make a decision to hire Tucker's services based solely on grievant's trust in Tucker's credentials and professional abilities, instead of as a favor to respondent.

There is no dispute that New York law did not impose on respondent an obligation to insure that the settlement funds be properly invested; any responsibility respondent might have felt was rooted solely on moral grounds. In the face of his actions, however, respondent's claims of moral responsibility are not worthy of belief. The fact that respondent sent grievant to his wife — instead of sending her to a financial consultant with whom he had no relationship — and that he did not disclose that he was married to Tucker allows the logical inference that his actions were intended to benefit Tucker, not grievant. Indeed, the record

supports the conclusion that respondent did not disclose to grievant that Tucker was his wife precisely because he was afraid that, with this knowledge, grievant might not have agreed to meet with Tucker, particularly in light of grievant's conviction that respondent was holding her funds hostage. If, in fact, respondent had nothing to hide, it would have been logical for him to express to grievant his concern for the safekeeping of the funds and then to suggest that she consult with Tucker because of his trust in Tucker's abilities.

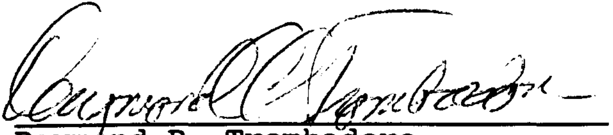
The record, thus, clearly and convincingly supports the conclusion that respondent deliberately concealed from grievant that Tucker was his wife, in violation of RPC 8.4(c). "In some situations, silence can be no less a misrepresentation than words." Crispen v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). In fact, at the Board hearing, respondent's counsel conceded that respondent had violated RPC 8.4(c). Respondent also violated RPC 1.15(b), when he failed to promptly deliver to grievant funds that she was entitled to receive.

Respondent's misrepresentation to grievant should be met with the imposition of a public reprimand. As the Court has consistently held, albeit in another context, intentional misrepresentation (of the status of lawsuits) ordinarily warrants a public reprimand. In re Kasdan, 115 N.J. 472, 488 (1989). The Board unanimously so recommends. The Board also recommends that respondent make prompt restitution to grievant in the amount of $7,500, representing the financial loss sustained when she

rescinded the investments and the commission earned by Tucker.

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

Dated: 11/1/1993

By: 
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