Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-417

IN THE MATTER OF	:
	:
CORNELIUS W. DANIEL	:
	:
AN ATTORNEY AT LAW	:

Decision of the
Disciplinary Review Board

Argued: January 31, 1996

Decided: June 3, 1996

Michael R. Dupont appeared on behalf of the District IX Ethics Committee.

Michael D. Schottland appeared on behalf of the respondent.

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

This matter is before the Board based upon a recommendation for discipline filed by the District IX Ethics Committee (DEC). While two separate complaints (Docket Nos. IX 93-52E, IX 93-53E, IX 93-54E, IX 93-60E, IX 94-52E, IX 94-42E and Docket No. IX 94-042E) were filed against respondent, the DEC dismissed all of the charges contained in the first complaint (Docket Nos. IX 93-52E, IX 93-53E, IX 93-54E, IX 93-60E, IX 94-52E and IX 94-42E), dated October 15,

1993, because either the grievants refused to testify or there was insufficient evidence to sustain findings of unethical conduct in the remaining matters. The Board reviewed the DEC's action in these matters and agrees that the record does not by clear and convincing evidence support a finding of unethical conduct and confirms the dismissal without further comment.

The second complaint charged respondent with violations of RPC 1.3 (lack of diligence) (District Docket No. IX 94-42E)(first count); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation)(first and second counts); and RPC 8.1(b) (failure to cooperate with a disciplinary authority)(third count).

At the time of the alleged misconduct, respondent was a partner in the firm of Kennedy and Daniel in Sea Girt, New Jersey.

Respondent received a private reprimand in 1988, for failing to pursue his client's matter and failing to keep his client informed about the status of the matter. Respondent received a second private reprimand in 1988 for improperly releasing funds that he had received as payment for a mortgage, without first obtaining a cancellation or discharge of the mortgage.

Respondent was admitted to the New Jersey bar in 1969. He currently maintains an office in Brielle, New Jersey.

* * *

District Docket No. IX-94-042E

Arleen Willett first met with respondent in May 1990 about a dispute with Sansone Toyota of Lakewood (Sansone Toyota) and First

Fidelity Leasing group, Inc. (First Fidelity), over a car she had leased from Sansone Toyota. Willett believed that she had contracted to lease an automobile with air conditioning and radio, but discovered at the time she took possession of the vehicle that neither had been installed.

Willett claimed that she had a verbal agreement to pay respondent approximately $600 for his services. According to Willett, respondent was to collect his fee after he recovered monies in her behalf. The record is silent about whether respondent was actually paid for any services performed.

Willett understood that respondent would try to settle her matter without instituting legal proceedings against the car dealer and leasing company. She learned that Sansone Toyota and First Fidelity were being uncooperative and that respondent, therefore, decided to file suit in her behalf.

Respondent filed a complaint on August 6, 1990. Exhibit P-13. The defendants thereafter filed an answer and a counterclaim for Willett's failure to make payments in accordance with the lease agreement.

In May 1992, Sansone Toyota served requests for admissions. When answers were not timely provided, the defendants filed a motion for summary judgment on the basis that all factual issues were deemed admitted pursuant to R. 4:22-1. The motion was returnable on September 11, 1992, before Judge Florence R. Peskoe, J.S.C. Apparently an associate of respondent's firm, Kevin Malone, was initially assigned to handle the matter. The associate sought

an extension of time to respond to the motion. When Malone left respondent's firm, a new associate, Vernon Estreicher, was hired in September 1992 and was assigned to handle the case. Estreicher worked at respondent's firm through March 1993. It was only his second legal position since graduating from law school.

Estreicher consulted with respondent on how to proceed in the matter. Approximately one month after Estreicher was hired, he was instructed to appear in court on Willett's matter. Prior thereto, respondent had instructed Estreicher to prepare responses to the defendants' request for admissions. Estreicher contacted Willett and met with her to prepare the responses. The Appellate Division decision filed in the matter on December 8, 1993, clarifies the procedural history of Willett's case:

> On May 5, 1992, counsel for Sansone Toyota served upon plaintiff's counsel demands for admissions pursuant to R. 4:22-1. Under the terms of that Rule, the matters would be admitted unless plaintiff responded to the contrary in writing within thirty days. On or about June 5, an attorney associated with the firm representing plaintiff requested an extension of ten days to respond to these demands, and that ten-day extension was granted.
>
> At the end of that ten-day period, there was no further response from plaintiff's counsel. Having heard nothing, defendant Sansone Toyota prepared and filed a motion for summary judgment based upon the fact that plaintiff, by her silence, had admitted all of the matters contained within the previously served demands for admissions. Co-defendant First Fidelity Leasing Group, Inc., prepared and filed a similar motion which rested on the same ground.

> The motions were originally made returnable on September 11, 1992. Approximately a week and a half before the return date, plaintiff's firm requested that the motions be carried due to the recent death of the father of the partner [respondent] responsible for this file. Defendants acceded to that request and the motions were adjourned until October 9. In that interim period, plaintiff's counsel responded to the demands for admissions, and filed opposition to the motions which argued that plaintiff's denial of certain of the demands created a material issue of fact which would preclude the granting of defendants' motion.
>
> The motions were orally argued and the trial judge refused to consider the plaintiff's denials as opposition to the defendants' motions. The trial court concluded that 'the unjustified lateness of the submission answers (sic) to the requests for admissions does not suffice to defeat the motions that are made and I'm willing to grant both motions.'
>
> Plaintiff's counsel then made a motion for reconsideration which was argued orally on November 6, 1992. This motion was accompanied by a certification of counsel in support of their position that the failure to respond to the requests for admissions until September 2, 1992 was due to excusable neglect. Among the items cited were that the associate at the firm previously handling the matter left during this time period, that there were changes in secretarial staff at the firm and that the partner in charge of the file suffered the death of his father. The trial court was unmoved and denied the motion for reconsideration. This appeal resulted.
> [Exhibit P-8]

The Appellate Division concluded that the trial court should have considered the merits of the plaintiff's responses to the demands for admissions in determining whether to grant defendants' motions for summary judgment. The Appellate Division further noted that the plaintiff's failure to respond to the requests for

admissions for more than three months after they were served was as "inexcusable as it was inexplicable." The Appellate Division stated that, if plaintiff wished to proceed with the action, defendants' counsel should be reimbursed by plaintiff's counsel for expenses incurred due to the plaintiff's delay in handling the matter. The Appellate Division remanded the matter to the trial court to determine the appropriate award of counsel fees.

It appears that, at each step of the proceedings, respondent advised Estreicher on how to proceed in the matter. He had instructed Estreicher to oppose the motion for summary judgment, file a motion for reconsideration and file an appeal in the matter.

After plaintiff's motion for reconsideration was denied, Estreicher prepared two memoranda to the file (Exhibits P-10 and P-11) in order to "cover himself." Estreicher was concerned because he was aware that respondent had not taken any steps to inform Willett of the status of her case. While Estreicher testified that respondent never instructed him to withhold from grievant information about the outcome of the summary judgment motion, he believed that respondent did not want him to inform Willett of the status of the matter. Estreicher was concerned that, as a new attorney with the firm, he might lose his job if he were to advise Willett of the outcome of the motions. Nevertheless, Estreicher believed that it was the firm's duty to notify Willett of the status of her matter. He, therefore, encouraged respondent to attend a meeting with Willett. Apparently, Estreicher contacted Willett about such a meeting and, on January 6, 1993, Estreicher,

respondent and Willett met. According to Estreicher, he had hoped that respondent would advise her of the results of the motions. Respondent, however, merely gave Willett a vague update, never advising her that a judgment had been entered against her. Willett testified that she may have been advised that an appeal had been filed, but she was unclear as to its purpose. Respondent, in turn, contended that he had advised Willett that an appeal had been filed because Judge Peskoe had made an adverse ruling, granting summary judgment to the defendants.

Respondent testified that he had never received the memoranda prepared by Estreicher, that they were not in the file and that he had no recollection of ever having read either memorandum. In Estreicher's first memorandum, dated January 9, 1993, he indicated that he had appeared before the judge on October 9, 1992, at which time the judge had granted the defendants' motion for summary judgment and ruled on the defendants' counterclaim by awarding them $8,708.84. The memorandum also indicated that the motion to vacate the judgment, which was prepared at respondent's direction, was argued on November 6, 1992 and was denied.

Estreicher noted that he had advised respondent of the judgment and suggested that grievant be advised of the situation. Exhibit P-10.

In Estreicher's memorandum of February 10, 1993, he indicated that one of the defendants' attorneys wanted to conduct a deposition about Willett's assets and was threatening to have her arrested if she did not appear. Estreicher indicated that he had

learned that Willett's son had passed away and had informed the defendants' attorney of the situation. The attorney, therefore, agreed not to take any further action until he spoke with Estreicher. Surprisingly, at the DEC hearing, Willett denied that her son had passed away.

Estreicher's memorandum again urged respondent to advise Willett of the fact that a judgment had been entered against her in the amount of $8,700. He indicated that she should be informed prior to the deposition, lest the defendants' attorney inform her of the judgment. Exhibit P-11.

Estreicher was let go from respondent's firm sometime in March 1993. According to respondent, Willett's case had nothing to do with Estreicher's departure. Respondent claimed that he did not see the Appellate Division opinion until February or March 1994. Nevertheless, he testified that, once he reviewed the opinion, he failed to take any action to proceed with the matter or to vacate the $8,700 judgment against grievant.

On March 15, 1994, Judge Peskoe entered an order requiring the plaintiff to pay, directly to First Fidelity's attorney, within twenty days, the sum of $2,550 in counsel fees plus $333.62 in expenses. The order also indicated that, once proof of payment had been made, the court would schedule for reargument the motions for summary judgment considered previously; in the event that plaintiff failed to make payment within the time prescribed, the complaint would be dismissed with prejudice upon an ex parte application.

Respondent testified that he never received the motion or saw the order until the twenty-day period had expired. There is no indication in the record that respondent took any steps to pay the fees and costs or to move for reargument on the motion for summary judgement, once he had had the opportunity to review Judge Peskoe's order.

Willett testified that, although she contacted respondent's office on a number of occasions, she never had a "clear picture" of what was going on. She felt that, every time she asked respondent a question, she was "put off." According to Willett, at the January 1993 meeting with respondent, he told her that he was still trying to resolve the matter to her satisfaction. 2T9.[1] She had a feeling, though, that things were not running smoothly with her case.

Willett also testified about her attempts to communicate with respondent. She claimed that she called respondent on numerous occasions and that he either would not return her calls or would advise her that there was no new information in the matter. She only spoke to respondent on occasion. Most frequently, she left messages for respondent and got very little information back when she did speak with him.

Willett further testified that she received a notice from respondent that she was to appear in the Monmouth County Superior Court on August 15, 1994 with regard to a trial date. Exhibit P-16. Respondent, however, denied that he had personally sent the

[1] 2T denotes the transcripts of the August 21, 1995 DEC hearing.

letter. Respondent explained that he was unaware of the trial notice because by that time his law practice had already dissolved and the notice had been sent to his former office. He further stated that on August 15, 1994, he happened to be in court and met Willett by chance on the first floor of the courthouse. They proceeded to the courtroom and waited for the judge to call the case. The matter, however, had apparently been put on hold, whereupon respondent advised Willett to go home as the trial would not go forward that day.

Thereafter, Willett sensed that something was amiss with her case. A few days later she, therefore, went to the courthouse to look at her file. It was then that she first discovered the March 15, 1994 order requiring her to pay $2,550 in counsel fees and $333.62 in costs to First Fidelity. Exhibit P-9. Willett also learned about the $8,700 judgment and award of counsel fees. Prior to reviewing the court's file, she was not aware of any of the actions taken or of the judgments.

After reviewing her file, Willett attempted to contact respondent but he did not return her telephone call. On or about August 17, 1994, she contacted the disciplinary authorities. Exhibit P-14.

In his behalf, respondent testified that his father died of cancer in August 1992. During that time he was involved in personal matters resulting from his father illness, while handling between 350 and 400 cases. He admitted that he was in court most of the time and, therefore, absent from the office.

Respondent claimed that he believed that Estreicher had kept Willett apprised of the status of her case. 3T1-10.[2] Respondent remarked that he neither tried to hide information from Willett nor instructed Estreicher to withhold any information from her. Respondent contended that the majority of his meetings with Willett were by chance when he happened to meet her at the courthouse while they were both there for other matters.

* * *

The DEC concluded that respondent's conduct constituted violations of RPC 1.4 and RPC 5.1 (responsibilities of a supervisory lawyer). The DEC noted that, although the complaint did not charge respondent with a violation of RPC 5.1, it should be amended to conform to the proofs.

The DEC found that there were two areas in which respondent's conduct exhibited a lack of diligence. First, respondent failed to monitor and supervise Estreicher's handling of grievant's matter and failed to ensure that the matter was being processed in a professional and zealous fashion. The DEC found that respondent should have ensured that Willett was fully apprised of the status of her case. Secondly, respondent failed to ensure that certain measures were taken to protect Willett's interests. As an example, the DEC noted that respondent should have recommended – and ensured – the filing of a motion to stay the trial court's order. The DEC

[2] 3T denotes the transcript of the August 28, 1995 DEC hearing.

concluded that respondent's repeated statements that he was not aware of the status of the case, of the Appellate Division decision, of defendant's motion for attorneys' fees and costs and of the entry of the judgment against Willett were inexcusable. According to the DEC, as the attorney retained to handle the matter and as designated trial counsel, respondent had the responsibility to make sure that the matter was handled properly. The DEC found that respondent's conduct violated of RPC 5.1. The DEC also felt that respondent's conduct, following the Appellate Division decision, was unjustifiable. The DEC remarked that, although respondent was aware that an appeal had been filed, he had not taken any steps to monitor the outcome of the appeal and had taken no action after reviewing the appeal some two or three months later. Moreover, while he claimed that he had spoken to Estreicher's successor with regard to the handling of the matter, no opposition was filed to the defendants' application for counsel fees and costs. Similarly, once Judge Peskoe's order was entered, no action was taken to vacate the order even after respondent saw the order, allegedly after the expiration of the twenty-day period. Lastly, the DEC pointed to respondent's failure to pay the counsel fees so that the motion for summary judgment could be reargued or to request reargument of the motion on behalf of his client.

The DEC stressed that respondent's lack of diligence after the Appellate Division opinion was issued was reprehensible. Respondent attended to Willett's matter only after the attorney grievance was filed in August 1994.

As a result of the foregoing, the DEC concluded that public discipline was appropriate. The DEC noted that respondent's case-load was excessive and that measures should be implemented to avoid similar problems.

The DEC found no misrepresentation with regard to the trial date and, therefore, dismissed count two of the complaint. At the start of the DEC proceedings, the presenter advised the hearing panel that he did not wish to present evidence regarding count three of the complaint, alleging a failure to cooperate with the disciplinary authorities. The DEC, therefore, dismissed that count as well.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is clearly and convincingly supported by the evidence.

Although different associates were assigned to work on Willett's matter, the record is clear that respondent remained responsible for the supervision of the file. According to Estreicher, respondent had instructed him to answer the requests for admissions and, when the defendants' motion for summary judgment was granted, respondent directed him to file a motion for reconsideration. Apparently, respondent also told Estreicher to file an appeal once the motion for reconsideration was denied. Willett understood that respondent was in charge of her case

because he was the attorney with whom she had first conferred, with whom she had negotiated a retainer and whom she called to obtain information about the case.

Notwithstanding that the complaint did not charge respondent with a violation of RPC 5.1 (responsibilities of a partner or supervising lawyer), there is clear and convincing evidence in the record to support the conclusion that respondent's actions in the Willett matter fell short of the requirements of RPC 5.1. Respondent claimed that he assumed that Estreicher was keeping Willett apprised of the status of her case and that Estreicher was capable of handling the case on his own. Estreicher's only other legal experience, however, had been a clerkship with the Monmouth County Prosecutor's Office. He had no prior experience in civil matters and, in fact, had conferred with respondent on procedures to follow in grievant's case. As the Court cautioned in In re Barry, 90 N.J. 286, 291 (1982), newly admitted attorneys in a law firm should be given guidance and supervision by their senior colleagues. As stated in the dissenting opinion:

> It is simply inexcusable to impose on a fledgling lawyer total responsibility for the clients' affairs without some regular supervision. It is not enough that the principals be available if needed.
>
> [Id. at 293]

The dissent further stressed the need for "a systematic, organized routine for periodic review of a newly admitted attorney's files" and proclaimed that the " 'sink or swim' approach is ill-suited to

a high volume professional operation." Ibid. Here, too, there was a "high volume" operation: respondent had a caseload of approximately 350 to 400 files (3T120) and Estreicher of approximately 150 files (3T126).

Subsumed in respondent's violation of RPC 5.1 is a violation of RPC 1.3 (lack of diligence). The record is fraught with examples of lack of diligence in the Willett matter. In addition, respondent's failure to reply to Willett's telephone calls or to advise her of the status of her matter violated RPC 1.4.

Respondent argued that his due process rights were violated because the DEC's decision focused on his conduct after the Appellate Division decision, which conduct had not been the subject of the formal complaint. While it is true that the DEC discussed at length respondent's conduct following the Appellate decision, respondent's conduct – his inaction and inadequate supervision of his associates – preceded the Appellate decision. Moreover, the specific allegations contained in the complaint concerning respondent's "failure to pay counsel fees," the "Appellate Court decision and subsequent Judgment," his "misrepresentations of the status of the file," his "failure to institute appropriate timely proceedings" and the like gave respondent sufficient notice of his improper conduct to allow him to present an adequate defense in the matter. The DEC findings in this matter, therefore, did not stray significantly from the charged violations.

The issue of respondent's responsibility for Willett's matter was fully addressed at the DEC hearing. Contrary to respondent's claims, his due process rights were, therefore, not violated by amending the charges to the complaint to include a violation of RPC 5.1, given that he was on notice due to the facts charged, and had full opportunity to be heard. Respondent's argument that this case is distinct from the factual scenario addressed in In re Logan, 70 N.J. 222, 230 (1976) must therefore fail. Furthermore, the court has recognized the Board's ability to amend ethics charges to conform to the proofs before it. See In re Miller, 135 N.J. 342(1994); In re Frunzi, 131 N.J. 571(1993).

* * *

Respondent's conduct violated RPC 5.1, RPC 1.3 and RPC 1.4(a). Ordinarily, similar cases dealing with gross neglect, lack of diligence, failure to communicate and misrepresentation about the status of the case result in the imposition of a reprimand where the misconduct has been confined to one matter. See In re Girdler, 135 N.J. 465(1994)(in one matter, failure to act with due diligence, failure to communicate with a client in a timely fashion and to prepare a written retainer agreement; prior private reprimand in 1991 in two matters for gross neglect and failure to communicate); and In re Stewart, 118 N.J. 423 (1990) (gross neglect in an estate matter and failure to keep client informed of status; attorney had a prior private reprimand).

In this case, most of the problems that arose resulted from respondent's passive involvement in the Willett matter. The Board, therefore, unanimously determined to reprimand respondent. One member did not participate.

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

Dated: 6/3/96

LEE M. HYMERLING
Chair
Disciplinary Review Board