

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-349

IN THE MATTER OF :
 :
DAVID J. BILDNER :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: November 20, 1996

Decided: January 23, 1997

Glenn F. Peterson appeared on behalf of the District XI Ethics Committee.

Anthony P. Ambrosio appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District XI Ethics Committee ("DEC"), arising out of respondent's misconduct in an automobile accident/personal injury case. Specifically, the complaint charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.1(b) (pattern of neglect); RPC 1.4(a) (failure to communicate); RPC 4.1(a) (1) (false statement of material fact to third person)

and RPC 4.1(a)(2) (failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); RPC 7.1(a)(1) (false or misleading communications relative to representation); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

* * *

Respondent was admitted to the New Jersey bar in 1991. At all relevant times, respondent maintained an office at 77 Howard Avenue, Passaic, New Jersey. Respondent has no prior ethics history.

In the summer of 1991, respondent undertook the representation of Rosemary Carrion and her two children for injuries sustained in a motor vehicle accident. He filed a complaint on their behalf in September 1991. Although the case was listed for arbitration on July 30, 1992 and October 8, 1992, respondent failed to appear on either date and failed to inform his client of the arbitration proceedings. As a result, the case was dismissed without prejudice by order dated October 8, 1992. The attorney for the defendant then filed a motion to dismiss the complaint with prejudice, based on the October 8, 1992 order. That motion was sent to respondent by certified mail. An order was entered on February 19, 1993 dismissing the case with prejudice, which order was served upon respondent by the

defendant's attorney. Respondent testified that he received the February 19, 1993 order and that, when he contacted the arbitration unit of the court, he was informed that he could not remedy the dismissal.

In or about July 1995, Carrion contacted respondent to inquire about the status of the case. On July 27, 1995, respondent wrote to Carrion:

This letter is to inform you that your case has been dismissed with prejudice. This means that your claim and the claims of your two children cannot be pursued against the driver of the other vehicle. Unfortunately, this happened as a result of my negligence in not acting in a timely matter to restore a default entered by the Court because your answers to interrogatories were not served on the defendant's within the time allowed by the rules.

My efforts to correct my mistake have been unsuccessful. You now have a claim against me for legal malpractice as the result of my negligence. I suggest that you show this letter to another attorney of your choice and request that he contact me to discuss a resolution of your claim against me. You should be aware that I was not covered by insurance at the time and I must pay you from my personal funds. I sincerely regret my error in this matter and accept the responsibility to compensate you for any loss caused by the error.

Carrion then retained Anthony J. Sposaro, Esq. ("Grievant"), to represent her in the matter. Grievant testified that he wrote to respondent on three separate occasions in order to obtain Carrion's file. Those letters are dated September 14, October 2, and October 17, 1995. Grievant also testified about several telephone calls to respondent's office, which were not returned.

By letter dated October 22, 1995, respondent assured grievant that the file would be forthcoming. Indeed, respondent forwarded the file to grievant by letter dated November 13, 1995. The file was incomplete and, according to grievant, did not contain any documentation regarding the dismissal. Grievant then contacted the attorneys for defendant and ascertained that the case had been dismissed with prejudice as a result of respondent's failure to attend the arbitration.

James S. Marotta, Esq., the initial DEC investigator, testified that he contacted respondent regarding the charges. Respondent indicated that the case was dismissed for failure to answer interrogatories and that he wanted to make restitution to Carrion. Despite several attempts by Marotta to secure restitution for Carrion, respondent was unresponsive to his request for information in that regard. Marotta concluded that respondent's conduct constituted misrepresentation, due to his failure to acknowledge that the complaint was actually dismissed for failure to attend the arbitration. Marotta thought respondent had been less than candid in representing to Carrion that the case had been dismissed for failure to answer interrogatories, rather than for respondent's failure to attend the arbitration. In his defense, respondent claimed that, at the time he wrote to Carrion, he was under the impression the complaint had been dismissed for failure to submit answers to interrogatories.

Respondent readily acknowledged that he acted negligently by allowing the complaint to be dismissed and by failing to keep his client informed about the status of the matter. He maintained that he had not received a copy of any documents regarding the

dismissal (other than the February 19, 1993 order) and that the order of dismissal that he did receive had been lost. According to respondent, that was the reason for not sending those particular documents to grievant. Finally, respondent indicated a willingness to make restitution to Carrion as soon as he is financially able.

* * *

The DEC found a violation of RPC 1.1(a) (gross neglect) as a result of respondent's failure to pursue the matter and allowing it to be dismissed with prejudice. The DEC also found a violation of RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate) for respondent's failure to act in a diligent manner and to notify Carrion about the dismissal for more than two years.

The DEC dismissed the charges relating to RPC 8.4(c) and RPC 8.4(d) for lack of clear and convincing evidence that respondent engaged in misrepresentation. Finally, the DEC found a violation of RPC 8.1(b) (failure to cooperate with the disciplinary authorities) for respondent's failure to reply to the DEC investigator's requests for information.

The DEC recommended that respondent be given a reprimand, that he be required to practice under a proctor for a period of one year and that he make full restitution to Carrion.

* * *

Following a de novo review of the record, the Board is satisfied that the DEC's findings of unethical conduct are clearly and convincingly supported by the evidence. Respondent's failure to prosecute the case on behalf of Carrion showed a lack of diligence, in violation of RPC 1.3. Respondent's failure to communicate with Carrion in a timely fashion, particularly in the two-year period between the dismissal with prejudice and his September 13, 1995 letter to her, constituted a violation of RPC 1.4(a).

There was a great deal of testimony regarding respondent's knowledge that the case had been dismissed for his failure to appear at the two arbitration hearings. Respondent consistently maintained that his recollection was as stated in his September 13, 1995 letter, that is, that the case had been dismissed with prejudice for failure to answer interrogatories. The distinction bears upon the charge that respondent misrepresented the reason for the dismissal. There was insufficient evidence in support of a finding of misrepresentation on respondent's part as to the reason for the dismissal. It is undeniable, however, that respondent did not apprise Carrion of the dismissal for a period of two years. In this regard, respondent's conduct violated RPC 8.4(c), and the Board so found. In some situations, silence can be no less a misrepresentation than words. Crispen v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). The Board dismissed the charge of a violation of RPC 8.4(d). The testimony of respondent together with his letter indicates that he was simply mistaken

as to the reason for the dismissal. The charges of violations of RPC 1.1(b), RPC 4.1(a)(1), RPC 4.1(a)(2), RPC 7.1(a)(1) were also dismissed, as they do not apply to this situation. Finally, the Board dismissed the charge of a violation of RPC 8.1(b), as respondent did appear at both the DEC and the Board hearings.

As to the issue that respondent sent an incomplete file to Carrion's new attorney, there is no clear and convincing evidence of impropriety in this context. It could be that respondent forwarded all that he had.

As an aside, in respondent's brief to the Board, he argued that the DEC had no right to order restitution in the Carrion matter because the underlying case has not been adjudicated. The Board agrees. Respondent has made no settlement offers to Carrion and the extent and value of her injuries have not been ascertained in any forum to date. In addition, there is no indication in the record that the malpractice action has moved forward. The Board determined that restitution is, therefore, premature and improper at this juncture.

With respect to the DEC's recommendation for a proctor, counsel to respondent pointed out in his brief that this matter is an isolated incident and that respondent has no prior ethics history or any other ethics matters pending against him. Under these circumstances, the Board determined that a proctor is unnecessary.

A reprimand has generally been imposed where the ethics violations have been a mixed combination of gross neglect, pattern of neglect, failure to communicate and misrepresentation. In some of these cases, two or three of these violations are present, either

alone or coupled with a different violation, such as failure to cooperate with the DEC or failure to keep proper trust account records. See In re Gordon, 139 N.J. 606 (1995) (lack of diligence and failure to communicate in two matters; gross neglect and failure to return a file in one of the two matters; prior public reprimand); In re Carmichael, 139 N.J. 390 (1995) (lack of diligence and failure to communicate in two matters; prior private reprimand); In re Wildstein, 138 N.J. 48 (1994) (failure to communicate in three matters; lack of diligence in two of the three matters and gross neglect in two of the three matters).

For respondent's lack of diligence, failure to communicate and misrepresentation to Carrion, the Board unanimously determined to impose a reprimand. One member did not participate.

The Board also required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

1/21/97

By: _____



Lee M. Hymerling
Chair
Disciplinary Review Board