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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-291

IN THE MATTER OF :
SHELDON G. WEINSTEIN, :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: April 22, 1996

Alfred Sauer appeared on behalf of the District XII Ethics Committee.

Morton S. Bunis 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 upon a recommendation for discipline filed by the District XII Ethics Committee (DEC), arising out of respondent's misconduct in four matters. Specifically, the complaint charged respondent in each of the four matters with a violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) RPC 8.1 (b) (failure to cooperate with the DEC), RPC 8.4(a) (violation of the Rules of Professional Conduct) and RPC 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent was also charged with a violation of RPC 1.16(d) (failure to turn over client property) — (mistakenly cited as RPC 1.16(a)), in two matters. Respondent did not file an answer to the complaint.

Respondent was admitted to the New Jersey bar in 1965. During the time relevant to the within matters, in addition to his private practice in Elizabeth, Union County, he also worked as a county attorney. He has no history of discipline.

Respondent's counsel, Morton S. Bunis, Esq., filed a brief with the Board contending that the DEC had deprived respondent of his due process rights during the hearing. The procedural history of the DEC hearing is set forth in some detail, as follows:

By letter dated June 30, 1994, apparently sent only via regular mail, the DEC panel chair advised respondent that the hearing would be held on August 3, 1994. The day before the hearing, August 2, 1994, the panel chair or her secretary telephoned respondent and left a message reminding him of the hearing. Respondent called the panel chair late that afternoon and represented "that he had no knowledge whatsoever that there were any ethics matters pending against him." 2T4.¹ Respondent contended that he had not received the June 30, 1994 letter or the formal complaint and asked for an adjournment of the hearing. "[B]ased upon inconsistencies in what [respondent] stated as to his knowledge of either the hearing and/or the pendency of these ethics complaints, the panel made a decision to proceed without him." 2T4.² During the August 2, 1994 telephone conversation, respondent

¹ 1T refers to the transcript of the hearing before the DEC on August 3, 1994. 2T refers to the transcript of the hearing on November 16, 1994.

² The panel chair stated during the hearing that her June 30, 1994 letter, presumably sent by regular mail, had not been returned as undeliverable. The chair also spoke with the DEC secretary, who stated that the formal complaint and a cover letter dated February 22, 1994 had been sent to respondent via certified mail on March 1, 1994. The return receipt indicated that the complaint had been picked up

was informed that it would be necessary to schedule a second hearing because one of the grievants was unavailable to testify. Respondent stated that he would obtain the transcript of the August 3, 1994 proceeding, would appear at the second hearing with counsel and would present his defenses. Respondent also stated that he would be involved in training new county attorneys in early September and asked that the second hearing not be held until October 1994.³

As noted above, the hearing proceeded as scheduled on August 3, 1994. By certified letter of that date, copies of documents admitted into evidence during the hearing were forwarded to respondent, who was also informed that he could obtain a copy of the transcript of the proceeding and that the second hearing would be held in early October.

A second hearing date was scheduled for November 16, 1994. Notice of the hearing was sent to respondent by letter dated October 25, 1994, through regular and certified mail. The return receipt card for the certified mail was returned after the DEC hearing and indicated delivery on November 17, 1994, the day after the hearing. The regular mail, however, was not returned.

On or about the day before the DEC hearing, the panel chair's

at respondent's post office box on March 18, 1994. The return receipt card was not made a part of the record. 1T5.

³ During the August 2, 1994 conversation, respondent noted for the record that the panel chair's law partner was employed by Union County as Assistant County Counsel. Respondent was also employed by Union County as Assistant County Counsel, albeit in a different office. Although neither the chair nor respondent saw a potential conflict of interest, they thought it wise to place the information on the record.

secretary called respondent to remind him of the hearing and spoke with his secretary. Respondent's secretary indicated that respondent did not have the date marked on his calendar. Respondent telephoned the panel chair at 4:10 P.M. that afternoon and asked for an adjournment. It is not clear if he contended that he had not received notice of the hearing.⁴ The panel chair replied that she was not inclined to grant his request.

Just before the beginning of the hearing of November 16, 1994, respondent's counsel, who was retained at 6:15 P.M. the prior evening, telephoned the panel chair to request an adjournment. After some consideration, that request was denied. The DEC agreed to keep the record open until December 16, 1994 to allow respondent to submit evidence of a medical condition and to make a proffer as to additional evidence to be considered by the DEC. The DEC also ruled that, although it was not inclined to allow cross-examination of the witnesses, it would consider a motion to that effect. The final date for additional information to be submitted was later extended to mid-January, at Mr. Bunis' request. By letter dated January 5, 1995, Mr. Bunis forwarded a psychiatric report indicating that respondent suffered from an obsessive-compulsive disorder. The letter also offered to make the doctor available for questions and referred to a January 9, 1995 hearing date.

⁴ During the second hearing, the panel chair stated, ". . . [respondent] is now presenting another last minute request based upon his allegation that he has not received due process notification of this hearing." Contrarily, respondent's counsel stated, ". . . the argument with respect to due process is not with respect to whether or not [respondent] had adequate notice of the proceeding. The due process argument is made because he has now retained counsel." 2T11-12.

Mr. Bunis also asked that the hearing be continued for two weeks to allow the submission of additional documents. By letter dated January 9, 1995, Mr. Bunis attempted to confirm that the hearing had been continued. According to Mr. Bunis, he received no reply to his request. Instead, the DEC issued its report without notifying him that the proceeding had been closed. (Mr. Bunis had also submitted a "character letter" during this time).

* * *

The facts of the matters before the Board are as follows:

The Kutner Matter (District Docket No. XII-93-08E)

In June 1990, Linda Kutner retained respondent to represent her in a proceeding to collect support payments from her former husband due her and/or her children. Respondent had previously represented Ms. Kutner's current husband, Marvin Kaplan, (the grievant in the Kaplan matter, infra). Ms. Kutner did not sign a retainer agreement and did not pay respondent a retainer. She believed that he would charge her a contingent fee. Respondent represented to Ms. Kutner that, because of his experience as an attorney for the county welfare board, he was well-qualified to handle her case.

In June 1990, respondent prepared a certification in connection with the support proceeding. Ms. Kutner signed the certification and returned it to respondent. Respondent filed a

motion to enforce litigant's rights, with an initial return date of October 11, 1991. Respondent withdrew the motion, however, because the children's expenses needed to be updated. After negotiations with counsel for Ms. Kutner's former husband proved unfruitful, respondent re-filed the motion, in or about November 1991.

Ms. Kutner, who was quite anxious to have a court date in this matter, called respondent twice a week for an unspecified number of months to find out about the status of the proceeding. She testified that she received "an unbelievable amount of excuses" from respondent and, apparently, no substantive information. 1T14. Respondent eventually told her that the hearing had been scheduled for the summer of 1992, but had been adjourned because the judge was on vacation. Thereafter, in or about the summer of 1992, Ms. Kutner contacted the court and learned that no hearing had been scheduled.

Ms. Kutner subsequently asked respondent for the return of her file. Although on three or four occasions respondent promised to deliver her file, he failed to do so.

In November 1992, Ms. Kutner retained Eugene Rosner, Esq. By letter dated November 25, 1992, Mr. Rosner forwarded to respondent a substitution of attorney and authorization to release Ms. Kutner's file. Respondent did not reply. On December 15, 1992, Mr. Rosner called respondent, who denied receipt of the November 25 letter. On that date, Mr. Rosner sent another substitution of attorney and authorization to respondent. Again, respondent did not reply. Thereafter, Mr. Rosner sent letters to respondent on

December 28, 1992 and January 12, 1993 and left numerous telephone messages, seeking Ms. Kutner's file. Respondent neither returned his calls nor forwarded the file. As of the DEC hearing, Ms. Kutner had not received her file.

In or about April 1993, Mr. Rosner contacted the court and ascertained that Ms. Kutner's motion, along with a cross-motion by her former husband, had been denied on March 20, 1992. According to Mr. Rosner, the judge's notes revealed that Ms. Kutner's motion had been denied because it did not provide "sufficient information to grant the relief sought" and "the papers lacks [sic] specificity." 1T64. Ms. Kutner specifically recalled that, subsequent to March 20, 1992, the date of the dismissal of the motion, respondent told her that the matter was being scheduled for a hearing.

Mr. Kaplan, Ms. Kutner's current husband, testified about his numerous conversations with respondent about the case and the delay in scheduling a hearing date. Beginning in early May 1992, respondent told Mr. Kaplan of a number of scheduled hearing dates and subsequent adjournments.

On an undisclosed date, Ms. Kutner obtained a judgment against respondent for malpractice.⁵

The DEC determined that respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 8.4(c). The DEC did not find clear and

⁵ Although a malpractice judgment is irrelevant to the within ethics proceeding, the information was made part of the record because, during conversations with the panel chair and with her secretary, respondent denied knowledge of the ethics proceeding but admitted knowledge of a problem in his representation of Ms. Kutner and Mr. Kaplan.

convincing evidence of a violation of RPC 1.16(d) (mistakenly cited as RPC 1.16(a)). (Although a violation of RPC 8.4(a) was charged in each of the four matters, the DEC made no specific findings as to that allegation. It is assumed, based on the DEC's other findings of misconduct, that a finding of a violation of RPC 8.4(a) was intended).

The Kaplan Matter (District Docket No. XII-93-62E)

Over a period of approximately twenty years, respondent represented Marvin Kaplan, the husband of Linda Kutner, in a number of matters. Until the within matter and the Kutner matter, Mr. Kaplan was satisfied with respondent's representation.

In or about early 1985, respondent undertook the representation of Mr. Kaplan's father in a contract dispute arising from a landlord/tenant matter. Mr. Kaplan acted as his father's agent. Although Mr. Kaplan could not produce a copy of the retainer agreement, he recalled that his father had signed it. Respondent was given a \$500 retainer and, shortly thereafter, \$220 for expenses.

In November 1985, respondent filed a complaint in behalf of Mr. Kaplan's father. Thereafter, over several years, Mr. Kaplan made numerous inquiries of respondent as to the status of the matter and their anticipated court appearance. Respondent explained that the court was backlogged and that it would take a long time to obtain a court date.

In the summer of 1992, Ms. Kutner, Mr. Kaplan's wife, called

the court and learned that there was no pending court date in this matter. Mr. Kaplan confronted respondent with this information, for which respondent had no explanation. When Mr. Kaplan expressed concern about the statute of limitations, respondent told him not to worry because he had filed the complaint on time. Thereafter, Mr. Kaplan asked respondent to turn over his file. Despite his promises to do so, respondent had not returned the file as of the DEC hearing.

In November 1992, Mr. Kaplan retained Mr. Rosner, who learned that the complaint had been dismissed on March 13, 1987 for failure to answer interrogatories. Mr. Kaplan testified that, in fact, he had met with respondent and had answered the interrogatories.

In evidence is a letter dated March 18, 1987 to respondent from opposing counsel in the underlying matter, forwarding the March 13, 1987 order dismissing the complaint. Respondent acknowledged receipt of the letter on March 21, 1987. Exhibit MK6. Respondent, therefore, must have known of the dismissal of Mr. Kaplan's complaint. Mr. Kaplan recalled, however, that on numerous occasions respondent had represented to him, after the date of the dismissal, that the matter was still pending.

By letter dated January 29, 1993, Mr. Rosner informed respondent that he had been retained to pursue a malpractice claim against him. Respondent did not reply. Mr. Rosner made no further attempt to communicate with respondent and proceeded with the malpractice action. A malpractice judgment was entered against respondent on July 12, 1993. Mr. Kaplan, however, has been unable

to collect the judgment because of a prior tax lien.

The DEC determined that respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.16(d)⁶ and RPC 8.4(c).

The Staron Matter (District Docket No. XII-93-61E)

On November 7, 1985, Robert Mariusz Staron retained respondent in connection with a personal injury matter arising from an October 20, 1985 automobile accident. Mr. Staron signed a contingent fee agreement. The record contains two letters from respondent to Mr. Staron's insurance company, both dated November 8, 1985, informing of respondent's representation of Mr. Staron, requesting an application for benefits and enclosing pertinent documents. Exhibits RMS-2 and RMS-3. Subsequently, respondent told Mr. Staron that he had filed a complaint in his behalf.

Despite Mr. Staron's subsequent attempts to obtain information about the status of his case, respondent repeatedly told Mr. Staron that he was very busy and that the case was proceeding apace. Although at some point during the representation Mr. Staron moved to another location, his telephone number did not change and respondent was apprised of his new address. Nevertheless, Mr. Staron received no other information from respondent. Furthermore, although the record is unclear, Mr. Staron's testimony indicated that at some point respondent changed his address and Mr. Staron

⁶ This allegation was not charged in the complaint. Also, it was not cited by the DEC in its summary of the findings. It is unclear if the DEC thought this allegation had been charged in the complaint or if the DEC deemed the complaint amended to conform to the proofs.

lost contact with him. (There are no allegations of abandonment in the record).

In 1992 or 1993, Mr. Staron contacted another attorney for assistance. According to Mr. Staron's testimony, that attorney attempted to contact respondent, to no avail.

Mr. Staron received medical treatment as a result of his accident. The medical bills, along with a subsequent notice of motion and notice before execution on a judgment, were given to respondent, who assured Mr. Staron that he was taking care of everything. The bills were apparently never turned over to the PIP carrier, whereupon the hospital obtained a judgment against Mr. Staron. RMS-4, RMS-5.

By letter dated December 2, 1993 to the clerk of the Superior Court, the DEC investigator inquired if a complaint had been filed in Mr. Staron's behalf. In fact, respondent had not filed a complaint and the statute of limitation had already expired.

The DEC determined that respondent violated RPC 1.1(a), 1.3 and 1.4(a). The DEC did not find clear and convincing evidence of a violation of RPC 8.4(c).

The Sutton Matter (District Docket No. XII-92-78E)

In March 1987, Edward Sutton retained respondent in connection with a workers' compensation claim arising from a March 18, 1987 injury. Although Mr. Sutton did not sign a retainer agreement, it was his understanding that respondent would be compensated on a contingent fee basis. Mr. Sutton did not sign any documents in

connection with his claim. Mr. Sutton took photographs of the work site where he was injured and gave respondent the photographs and other relevant documents. Mr. Sutton testified that he saw respondent on an additional three or four occasions in 1987 and, for approximately three months after he was retained, called respondent frequently to inquire about the status of his case. Respondent gave Mr. Sutton a number of excuses, presumably to explain the delay in the proceedings, such as he was ill or his secretary was out. Nevertheless, respondent made it clear to Mr. Sutton that he was working on his case. After the three-month period, Mr. Sutton, believing that respondent was pursuing his claim, did not contact him until April 1988, when his wife, Teresa Sutton, was injured in a bicycle/automobile accident. Because Ms. Sutton has a limited command of the English language, Mr. Sutton accompanied her to respondent's office. Ms. Sutton retained respondent to represent her. She did not sign a retainer agreement but understood that respondent would be paid on a contingent basis. The Suttons met with respondent on two or three occasions in 1988 and gave him photographs of Ms. Sutton's injuries as well as her medical bills.

The Suttons continued to call respondent to learn the status of their cases. Respondent led them to believe that he was working on both cases.⁷ In fact, respondent did not file a complaint in behalf of either Mr. Sutton or Ms. Sutton.

⁷ The record is unclear as to whether respondent specifically told Mr. Sutton that one or both cases were pending before the court. 2T48.

In 1991 or 1992, the Suttons consulted with another attorney about a will matter and asked him to contact respondent. According to Mr. Sutton, that attorney made several calls to respondent requesting the files, unsuccessfully. A second attorney, who was assisting the Suttons on a separate matter, also contacted respondent. Although the record is not clear, it appears that respondent told that attorney to have Ms. Sutton come to his office to see him. Apparently, Ms. Sutton did so but respondent did not appear.

The DEC found that respondent violated RPC 1.3 and RPC 1.4(a). The DEC did not find clear and convincing evidence of a violation of RPC 8.4(c). Although the complaint charged respondent with a violation of RPC 1.1(a) and RPC 1.16, the DEC did not make a finding in this regard. The DEC also found that the record contained clear and convincing evidence of a violation of 1.1(b).

Failure to Cooperate with the DEC

By letters dated March 5 and April 29, 1993, the DEC investigator sought information from respondent in the Kutner matter. Respondent did not reply. By letter dated September 16, 1993, the DEC investigator sought information from respondent in the Kaplan matter. Respondent sent nothing. By letter dated October 4, 1993, the DEC investigator sought information from respondent in the Staron matter. Respondent ignored the request.

(The record is silent about the specific steps undertaken by the investigator to communicate with respondent in connection with

the Sutton matter). The DEC, however, did not find clear and convincing evidence of a violation of RPC 8.1(b). The DEC did not explain this finding.

As noted above, respondent submitted a psychiatric report attesting that he suffered from an obsessive-compulsive disorder. The report (Exhibit F) stated that "[t]his emotional difficulty, as described above, is certainly responsible for [respondent's] difficulties with his law practice and with his overall professional responsibilities as well as his marital problems." The report further stated that respondent has agreed to continue treatment and that his prognosis is good.

On the date of the Board hearing, respondent submitted an updated report discussing respondent's treatment and progress. The report indicated that his prognosis remains good and that he "is now able to assume the full responsibility of an attorney."

* * *

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

The Board reviewed the issue of respondent's notice of the DEC hearings and the DEC's decision to proceed in his absence. The Board determined that respondent had actual or constructive notice of both hearings. Although the notice of the first hearing was

sent only via regular mail, it was not returned and the address was correctly listed. Notice of the second hearing was sent via regular and certified mail, but the certified receipt mail was not delivered until the day after the hearing. The regular mail, however, was never returned to the DEC secretary or panel chair as undeliverable. Under these circumstances, the Board was persuaded that respondent had at least constructive, if not actual, notice of the DEC hearings. Given the return receipt card in the possession of the DEC secretary bearing a signature, respondent has little credibility in this regard.

Even assuming, for argument's sake, that respondent did not receive notice of the November 16 hearing, it is uncontroverted that he was aware that there was an ethics proceeding against him after the panel chair's call of August 2, 1994. Once respondent became aware of the pending proceeding, there was some onus on him to contact the DEC when he allegedly did not hear from the chair until November 15, 1994, over three months after the first hearing date, to ascertain the status of the proceeding.

Furthermore, respondent failed to retain counsel until 6:15 P.M. on November 15, 1994, over three months later, and the night before the hearing. This fact lent no credibility to respondent's contentions. Instead, it evidenced his desire to avoid and put off this proceeding for as long as possible.

The Board, therefore, determined that respondent had adequate notice of the hearings and sufficient time to retain counsel.

As noted above, respondent's counsel filed a brief contending

that the DEC violated respondent's due process rights by (1) failing to grant counsel's request for an adjournment to allow him time to become acquainted with the file, thereby denying respondent his right to counsel and (2) by failing to consider respondent's medical condition and denying respondent the opportunity to expand the record. Counsel also noted that the DEC made no mention of respondent's "character letter."

The Board found no merit in respondent's argument that he was denied the right to counsel. As noted above, respondent failed to retain counsel until the evening before the DEC hearing. Respondent did not contend that he had previously sought counsel and had been unsuccessful. Rather, he delayed retaining counsel for as long as possible. Respondent cannot claim a violation of his due process rights in light of his flagrant failure to retain counsel until the eleventh hour.

With regard to respondent's alleged inability to expand the record, it is not clear how long respondent would have the DEC wait while respondent decided what, if anything, he wished to add to the record. Respondent's counsel contacted the DEC twice in January 1995 on that issue. He then contended that no one replied to his letter of January 9, 1995 and that the next correspondence he received was the panel report. The panel report was not issued until June 1995, some six months after counsel's correspondence. Counsel could have easily contacted the panel chair directly, within that time period, and pursued the issue of expansion of the record. Furthermore, counsel had been directed to file a motion if

he wished to cross-examine the witnesses, which he failed to do.

Similarly, respondent's argument that his medical report was not considered by the DEC is without merit. Respondent's medical/psychological problems do not go to the issue of guilt. Rather, they may serve as a mitigating factor to be considered by the Board in determining the level of discipline to be imposed. Thus, respondent's condition was properly considered by the Board and not by the DEC. Respondent's condition is addressed below.

Procedural problems aside, it is unquestionable that respondent was guilty of serious misconduct. The Board accepted the findings of the DEC with the exception of one. The DEC did not find that respondent failed to cooperate with the DEC in any of these matters. The Board disagreed. Respondent did not reply to the DEC investigator's requests for information, file an answer to the complaint or appear for either DEC hearing. His argument that he was unaware of the proceedings is, as noted above, unconvincing.

In four matters, respondent exhibited varying combinations of gross neglect, lack of diligence, failure to communicate, misrepresentation, failure to turn over a file, pattern of neglect generally and failure to cooperate with the DEC. This misconduct is serious and warrants a term of suspension. In determining the length of that term, however, the Board recognized that respondent has been admitted to the bar since 1965 and has not been previously disciplined. Furthermore, there are no cases pending before the DEC. It is possible that the within matters were aberrational and that respondent's misconduct will not be repeated. As noted

earlier, respondent has submitted a psychiatric report attesting to his obsessive-compulsive disorder and its effect on his ability to practice law in a private setting, as well as problems in his personal life.

Nevertheless, although respondent's psychological and personal difficulties may mitigate his misconduct, they do not excuse it. The Board is sympathetic to respondent's psychological disorder and his marital difficulties. The fact remains, however, that he caused great harm to four clients (not counting Mrs. Staron) with apparently valid claims, each of whom will likely collect nothing due to respondent's inaction. Also of concern was the fact that these cases cover a time period from 1985 until the present, a ten-year span. Respondent did not seek treatment until November 1994.

In light of the foregoing, the Board unanimously voted for a three-month suspension. See In re Hodge, 130 N.J. 534 (1993) (three-month suspension for a pattern of neglect, failure to communicate, failure to turn over client property, failure to maintain a bona fide office and failure to cooperate with disciplinary authorities).

Prior to reinstatement, respondent must submit proof of his fitness to practice law. Once respondent has returned to the practice of law, he is to continue counseling with a psychiatrist for a period of one year or until discharged by the psychiatrist, whichever is later.

In addition, following reinstatement, respondent may practice law only under the supervision of a proctor, approved by the Office

of Attorney Ethics, for a period of one year.

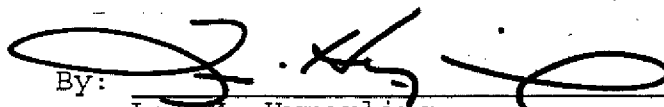
Two members did not participate.

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

Dated:

4/22/86

By:



Lee M. Hymerling
Chair
Disciplinary Review Board