

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-101

IN THE MATTER OF :
:
RUSSELL E. PAUL, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 21, 1993

Decided: May 20, 1994

Michael J. Hogan appeared on behalf of the District IIIB Ethics Committee.

Respondent appeared pro se.

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

This matter was originally before the Board on a recommendation for a private reprimand filed by the District IIIB Ethics Committee ("DEC"). The Board subsequently elected to treat the matter as a recommendation for public discipline and bring it on for hearing.

The formal complaint in this matter charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.4 (failure to keep client reasonably informed), RPC 3.3 (making a false statement of material fact to a tribunal) and RPC 4.1 (knowingly making a false statement of material fact in representing a client).

Respondent has received two private reprimands in the past. In October 1974, respondent was privately reprimanded for having failed to notify his client that an appeal had been dismissed. In addition, in December 1987, respondent was privately reprimanded for having failed to pursue his client's potential claim against the driver in a personal injury action and for having failed to advise that client that the statute of limitations on that action had run, thereby allowing his client to believe that negotiations were still pending.

Respondent entered into written stipulations of fact with the DEC presenter, which were submitted to the DEC. The stipulations address respondent's negligent handling of a matter entrusted to him. Essentially, the stipulation establishes that, on or about March 7 or 8, 1991, respondent was consulted by Dr. Robert C. Villare, M.D. ("grievant") about an arbitration proceeding then pending in Pennsylvania, in which grievant was a named defendant (hereinafter "Penoni matter"). The purpose for that initial contact was for advice only. Grievant did not then retain respondent. Thereafter, the arbitration proceeding resulted in an award against grievant in the amount of \$14,092 plus interest. The plaintiff in that action then filed a complaint in the Law Division of the Superior Court of New Jersey, Gloucester County, based upon the Pennsylvania arbitration award. That complaint ultimately found its way to respondent for defense.

Grievant wrote to respondent on several occasions between June 14, 1991 and August 22, 1991, inquiring about the status of his

matter. Paul never responded to any of those letters, nor did he offer any explanation for his failure to do so. T16.¹ Similarly, during that period of time, grievant telephoned respondent on several occasions, in an attempt to learn the status of his matter. On one such occasion, when grievant did reach respondent, respondent advised grievant that he was "working on the file and preparing letters and responses and it will be taken care of." Paragraphs 11 and 13, Stipulation, J-1 at 4. Respondent, however, never filed any responsive pleadings on grievant's behalf. Although respondent had assured grievant, on the few occasions that they had spoken, that he would copy grievant on relevant documentation so that he could keep abreast of the pending litigation, he never did so.

Ultimately, because no responsive pleadings were filed on grievant's behalf, the plaintiff obtained a judgment by default. When grievant learned of the judgment, he wrote to respondent and directed that his file be forwarded to another attorney. Respondent promptly complied with that direction.

Finally, respondent admitted, by way of stipulation, that, when he met with the DEC investigator, he represented to the investigator that he had never received the Superior Court complaint in the Penoni matter and that, further, he never agreed to represent grievant. Upon further investigation, respondent found that statement to be untrue.

¹ T denotes the DEC hearing transcript of October 22, 1992.

During the hearing, respondent explained to the DEC that Dr. Villare's case had essentially fallen between the cracks. He did not offer any explanation for having misrepresented his efforts in the case as well as its status to his client. Finally, in response to specific questions posed by panel members, respondent stated that, when he told the DEC investigator that Dr. Villare had not delivered a copy of the Penoni complaint to him, he had not first checked his file. Had he done so, he would have realized that a copy of the complaint had, indeed, been delivered to him. (Along these same lines, it should be noted that, in his answer, respondent unequivocally denied that there was any mention by anyone of the Penoni matter during the early part of 1991. See Answer at 2, paragraph 4. However, as noted in paragraph 4 of the stipulation, respondent billed Dr. Villare for time spent on that matter as early as March 7, 1991 and March 8, 1991).

* * *

The DEC found respondent guilty of gross neglect for having failed to file any responsive pleadings on Villare's behalf, for having failed to undertake any investigation on his behalf, for having failed to open a file in the matter and for having failed to respond to his client's several requests for information regarding the status of his case, all in violation of RPC 1.1(a). In addition, the DEC found respondent guilty of having failed to keep his client "adequately and accurately informed", in violation of RPC 1.4. While the panel found respondent factually guilty of having misrepresented the status of his client's case to him, it is

unclear whether it considered that conduct to be a violation of RPC 1.4 or RPC 1.1. Finally, the DEC found respondent guilty of having misrepresented to the DEC investigator that he never received a copy of the complaint in the Penoni matter, in violation of RPC 3.3(a)(1). The DEC specifically declined to find a violation of RPC 4.1, because respondent was not acting in a representative capacity when he made the misrepresentation to the DEC investigator.

The DEC determined that a private reprimand was the appropriate form of discipline for respondent's misconduct. At the Board hearing, the DEC representative advised the Board that that recommendation was based upon a misimpression that this was respondent's first ethics infraction.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's finding of unethical conduct is fully supported by clear and convincing evidence. Respondent's conduct violated both RPC 1.1(a) and RPC 1.4(a), by virtue of his failure to take any action on his client's behalf, as well as his failure to keep his client reasonably informed about the status of his matter. Similarly, respondent's misrepresentation to his client about the status of his case violated RPC 8.4(c). Indeed, respondent admitted his misrepresentations in paragraphs eleven and thirteen of the stipulation.

The Board cannot agree, however, with the DEC's finding that respondent made a misrepresentation to the DEC investigator when he initially denied the receipt of the complaint against grievant. While respondent was clearly and admittedly negligent when he made that representation, his conduct did not amount to a knowing false statement of material fact, as prohibited by RPC 8.1(a). The Board, therefore, recommends the dismissal of any charges of misrepresentation to the DEC investigator.

That notwithstanding, respondent's misconduct was serious. Not only did he neglect his client's matter from the beginning, but he also lied to his client in response to his requests for information. Similar misconduct has resulted in the imposition of a public reprimand. See, e.g., In re Kasdan, 115 N.J. 412 (1989). The Board recognizes, however, that the purpose of discipline is not the punishment of the offender, but "the protection of the public against an attorney who cannot or will not measure up to the high standard of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethics infraction in light of all the relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors as well as aggravating factors are, therefore, relevant and may be considered.

Here, in mitigation, the Board notes that respondent fully cooperated with the DEC. In addition, he admitted his wrongdoing and appeared contrite for his misdeeds. On the other hand, and in

aggravation, respondent was twice before the subject of a private reprimand for similar misconduct. In addition, respondent's client apparently suffered substantial harm as a result of his actions. Specifically, judgment by default was entered against grievant, requiring him to retain an attorney to attempt to set aside that judgment. The record is silent as to the ultimate results of that attempt.

Taking into account the totality of the circumstances, a six-member majority of the Board recommends that respondent receive a public reprimand for his violations of RPC 1.1(a), RPC 1.4(a) and RPC 8.4(c). One member dissented, voting for a three-month suspension. That member believed that respondent engaged in a pattern of misrepresentation to his clients, which required a more severe sanction. Two members did not participate.

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

Dated: 5/20/94

By: Elizabeth L. Buff
Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board