Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-287

IN THE MATTER OF :
:
ARTHUR J. BREITKOPF :
:
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: February 26, 1996

Joseph P. Depa, Jr. appeared on behalf of the District XII Ethics Committee.

Respondent appeared pro se.

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 XII Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.1(a)(gross neglect), RPC 1.3(lack of diligence) and RPC 1.4(a) (failure to keep client reasonably informed and to promptly comply with reasonable requests for information). Respondent did not file an answer to the complaint, although he did appear at the DEC hearing. The complaint did not charge respondent with a violation of RPC 8.1(b)(failure to cooperate with the disciplinary authorities).

Respondent was admitted to the New Jersey bar in 1948. On October 10, 1975, respondent was temporarily suspended for failure

to keep records in accordance with R. 1:21-6. He was subsequently reinstated on June 4, 1979, after the Board concurred with the report filed by the District V Ethics Committee, dismissing all charges pending against respondent and recommending his reinstatement. Respondent's reinstatement was conditioned upon a one-year supervision of his trust and business accounts.

On June 22, 1990, respondent was privately reprimanded for failure to keep a client reasonably informed. Specifically, respondent failed to advise a client that her complaint had been dismissed for failure to answer interrogatories.

Finally, more recently, on December 15, 1995, the Board transmitted to the Court it's decision in the companion case to this matter (Caulton v. Breitkopf, Docket No. DRB 95-097). In that case, although the Board did not sustain the bulk of the underlying substantive charges, it found that respondent had failed to cooperate with the disciplinary authorities and to reduce his fee agreement to writing. For those violations, as well as a finding of misrepresentation in yet another companion matter, the Board imposed a reprimand.

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In or about April 1990, respondent was retained by Auguster Cherry (hereinafter "grievant") to represent him in both a criminal action for possession of a handgun and a civil action against the arresting police officers. Grievant maintained that several Newark

police officers beat him with batons and blackjacks about his arms and legs during the course of his arrest. Grievant initially met with respondent in the presence of Johnnie Caulton, who was arrested with him and whom respondent also agreed to represent.

The scope of respondent's representation in that matter is at issue here. While grievant steadfastly maintained that he retained respondent to represent him in both the criminal matter and in a civil action for damages against the arresting officers, respondent insisted that he was retained only in the criminal matter. There was no written fee agreement setting forth the nature and scope of representation, as required by RPC 1.5. (Respondent was not charged with a violation of that rule).

Grievant testified that, when he and Caulton initially met with respondent, he told respondent that he had been beaten by the police officers, that they had stolen money from his cash drawer at his place of business, where he was arrested, and that he wanted to file a civil suit against the police officers. Grievant testified that respondent told him that he would work on the criminal case first. Grievant adamantly maintained that, at the initial meeting, and in Caulton's presence, he had informed respondent of his desire to file a civil suit against the arresting officers.

A review of respondent's intake notes (Exhibit R-2 in the Caulton matter) discloses the notations "cops beat Johnie and he; cops beat them; missing $375, missing $170 . . . ." The notation "make complaint to internal affairs" also appears in that document. In fact, according to grievant, respondent accompanied him and

Caulton to internal affairs on at least two occasions. Grievant testified that he believed the visits to internal affairs to be part and parcel of the civil action against the police officers. 2T46.[1] However, in his earlier testimony before the DEC in the Caulton matter, grievant testified that he wanted respondent to file a "grievance" against the police officers involved in the alleged beating in order to "suspend them or something like that." 1T 123-126. Only after pointed questioning by a DEC hearing panel member did grievant finally state that he wanted respondent to file a claim for money damages against the arresting officers. 1T25.

In any event, grievant testified that, after he entered his guilty plea on the criminal charges in October 1991, he began to telephone respondent on a regular basis to obtain information about the status of the civil action and, more specifically, to learn whether suit had been filed. On several occasions, respondent told grievant not to worry and that he had it "covered." 2T11. However, grievant became discouraged by respondent's repeated reassurances that he would "take care" of the civil suit, while offering no specific information as to its status. He, therefore, sought the advice of another attorney approximately eight or nine months after the conclusion of his criminal matter. Grievant learned from that attorney that respondent had neither filed suit in his behalf nor filed a notice of claim with the City of Newark,

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[1] "2T" refers to the transcript of hearing before the DEC in this matter in which only Cherry and respondent testified. "1T" refers to the transcript of hearing before the DEC in the Caulton matter, in which Cherry (grievant), Caulton and respondent all testified.

as required by Title 59. Moreover, by that time, the statute of limitations against all defendants had run.

Respondent testified that it was never his intention to represent grievant and Caulton in any civil action; however, because the two had expressed some interest in finding a way to "get even" with the arresting officers, during their initial meeting with respondent, he suggested that they lodge a complaint with the internal affairs division. Respondent vigorously denied that a civil action for damages was ever discussed during their initial meeting. Respondent testified that, had grievant asked respondent to file a civil action in his behalf, he would have refused to do so for two reasons. First, respondent did virtually no personal injury work; his practice consisted almost exclusively of criminal matters. Second, respondent viewed grievant's claim that the arresting officers beat him as routine in criminal cases; he, therefore, would have viewed the claim as questionable.

Respondent testified that grievant mentioned nothing about filing a civil action against the arresting officers until well after his criminal case was concluded. By that point, however, respondent had become disenchanted with grievant because he had failed to pay the balance of his fee on the criminal matter, despite many requests on respondent's part. He, therefore, told grievant to hire new counsel. Respondent testified that he had not advised grievant of the ninety-day tort claim notice because, by the time he learned of grievant's desire to file a civil action, ninety days had already long passed.

As in the Caulton matter, respondent maintained that grievant was pursuing this ethics complaint against him as a ploy to avoid paying him the balance of his fee on the criminal matter. While grievant denied that he owed respondent any additional fee, he admitted that respondent had sent him a statement for fees, which he refused to honor without further documentation. The two apparently had a telephone conversation thereafter, in which grievant denied any further obligation. Although respondent allegedly threatened to sue grievant for the balance of the fee, he has not done so to date.

At some unidentified point after his telephone conversation with grievant, respondent received a telephone call from an attorney who inquired about the status of grievant's civil action. Respondent advised that attorney that he "had no civil action" for him. 2T68. Respondent denied that either grievant or the other attorney ever asked for grievant's file. (Presumably, there would be no file, since respondent maintained that he had never agreed to handle any civil action).

Finally, respondent admitted that there was no written fee agreement in this matter, despite the fact that he had never before represented grievant. He testified, however, that he had written the amount of his fee on the back of a piece of scratch paper and had given it to grievant, as was his common practice.

* * *

The DEC found that respondent had agreed to represent grievant in a civil action against the arresting officers and had failed to pursue the action in his behalf, in violation of both RPC 1.1(a) and RPC 1.3. The DEC further found respondent guilty of a failure to keep his client reasonably informed about the status of the matter and to reply to his reasonable requests for information, in violation of RPC 1.4(a). The DEC based its determinations essentially on a credibility assessment of the witnesses and particularly on what it viewed as inconsistencies in respondent's testimony. The DEC further found respondent's testimony to be inconsistent with the documentation produced — particularly respondent's initial intake notes.

* * *

Upon a de novo review, the Board is satisfied that the record clearly and convincingly supports a finding that respondent was guilty of unethical conduct. However, the Board cannot agree with the DEC's specific findings that respondent agreed to represent grievant in a civil action, that he failed to pursue that action and that he failed to keep his client informed of the status of that matter or to respond to his reasonable requests for information, all in violation of RPC 1.1 (a), RPC 1.3 and RPC 1.4 (a).

Although the DEC based its decision, in part, upon a credibility assessment of the parties, that assessment is not necessarily consistent with the documentary evidence. For example, respondent contended — and his notes indicated — that he and grievant discussed lodging a complaint with internal affairs only. The fact that respondent made a notation that Cherry, Caulton or both had complained that the arresting officers beat them and stole money from their cash drawer does not clearly and convincingly support the conclusion that a civil suit was discussed or even contemplated. On the other hand, such notations coupled with the entry, "make complaint to internal affairs," would support the inference that only that particular course was discussed. That is further corroborated by the fact that respondent accompanied grievant and Caulton to internal affairs on at least two occasions to make such a complaint. Indeed, grievant's initial understanding of respondent's proposed actions — to file a "grievance" against the police officers in order to suspend them — is certainly more consistent with the undertaking of filing an internal affairs complaint than with the undertaking of filing a civil action for damages. Moreover, there is nothing in respondent's intake notes indicating any intention to pursue a civil action. For example, typically, the extent and nature of injuries would be explored as well as the name of medical providers, such as the emergency room grievant allegedly visited. Such information would have been essential not only to comply with Title 59 notice requirements, but also to obtain the documentation necessary to process a personal

injury claim.

Furthermore, from a strategy standpoint, if there were a discussion of a civil suit at the initial meeting, that potential claim should have been used by respondent to his client's advantage in the criminal action — certainly for purposes of plea negotiation. In other words, if respondent had known of grievant's desire to file a civil claim, it probably would have occurred to him to file a Title 59 notice immediately, with the anticipation that the city — particularly the police department — would deal with his client more favorably, come time for plea negotiation, on the condition that the civil suit be dismissed or favorably and quietly resolved.

Finally, and on a more practical level, given respondent's testimony that his practice consisted largely of criminal defense and that he had done only very limited personal injury work years earlier, it is unlikely that he would take on this particular civil claim, where he considered liability to be so questionable.

In short, respondent's testimony is as believable — or as unbelievable — as grievant's. They both gave testimony that was inconsistent with their prior testimony as well as internally inconsistent. Their testimony, thus, leaves the evidence in equipoise. Moreover, the balance of the record does not clearly and convincingly establish the violations found by the DEC. The Board has, therefore, determined to dismiss those charges.

Although the record does not support the charges set forth in the complaint, respondent's conduct was not entirely proper in this

matter. To be sure, his actions fell far short of good practice. There is no doubt that grievant was under the erroneous impression that respondent had agreed to handle a personal injury matter for him. The responsibility for that mistaken belief must rest, to a great extent, with respondent. Clearly, had he provided grievant with a written fee agreement, as required by RPC 1.5, grievant would have known that respondent was not pursuing any such action in his behalf. Respondent's conduct, therefore, violated RPC 1.5. While the complaint did not charge respondent with a violation of RPC 1.5, that particular issue was fully litigated during the DEC hearing. The complaint is, thus deemed amended to conform with the evidence. Furthermore, once respondent learned of grievant's desire to pursue a civil action, albeit late in the game, respondent should have clearly explained to grievant that he would not undertake such representation and should have followed that advice with a writing setting forth grievant's legal rights and obligations.

Ordinarily, a failure to reduce a fee agreement to writing would result in the imposition of an admonition. However, in this case, respondent's failure caused grievant to harbor the mistaken impression that respondent had agreed to represent him in a civil action. The consequences to grievant were serious: he was forever barred from pursuing his claim against the arresting officers. Therefore, under a totality of the circumstances, including respondent's past ethics history, a six-member majority of the Board determined to reprimand respondent for his misconduct. One

member voted to dismiss all charges, finding insufficient evidence of unethical conduct. Two members did not participate.

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

2/26/96
Dated

Lee M. Hymerling, Esq.
Chair, Disciplinary Review Board