SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 88-44

IN THE MATTER OF	:
RONALD SAGE,	:
ATTORNEY-AT-LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 19, 1989

Decided: November 7, 1989

John Kreizman appeared on behalf of the District IX Ethics Committee.

Respondent appeared pro se.

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

This matter is before the Board based on a presentment filed by the District IX Ethics Committee.

Respondent was admitted to the practice of law in New Jersey in 1986 and has been engaged in private practice in Monmouth County since that time. He is both a Certified Civil Trial Attorney and a Certified Criminal Trial Attorney.

Respondent was retained by David Vanderdrift to represent him in a personal injury action stemming from an automobile accident on November 2, 1985. Grievant informed respondent that, prior to the accident, he had been treated by a chiropractor for pain in his lower back. After the accident, Mr. Vanderdrift received treatment in the neck area from the chiropractor.

On December 12, 1985, Mr. Vanderdrift began seeing Dr. Theodore J. Zaleski, an orthopedic surgeon and the grievant in this matter. Respondent requested medical reports on Mr. Vanderdrift from the chiropractor and Dr. Zaleski on June 30, 1986. Dr. Zaleski complied with that request by letter dated July 20, 1986, stating that Mr. Vanderdrift had experienced lower back pain prior to the accident. Specifically, Dr. Zaleski stated that Mr. Vanderdrift

> noted the spontaneous onset of low back pain in August of 1985. He was treated by a chiropractor, who did not provide long lasting nor [sic] complete relief. The back pain was exacerbated as a result of a motor vehicle accident on 11-2-85. Because of the failure of conservative treatment to produce long lasting, substantial relief, a CAT scan and myelogram were performed, which confirmed the presence of a herniated disc at the L4-L5 level and questionable protrusion of a disc at the L5-S1 level. [Exhibit J-1 admitted into evidence at the hearing held on August 25, 1987.]

Respondent testified that Mr. Vanderdrift had told him that he had no history of back pain prior to the accident. Thus, upon receipt of Dr. Zaleski's report, respondent contacted Mr. Vanderdrift and discussed the prior history mentioned in the report. Respondent directed Mr. Vanderdrift to speak with Dr. Zaleski to clear up the apparent inconsistencies. While Mr. Vanderdrift did meet with Dr. Zaleski, the record is not clear on what Mr. Vanderdrift told Dr. Zaleski. Late in July, and prior to receiving the requested report from the chiropractor, respondent telephoned Dr. Zaleski and asked that he prepare a new report, omitting the prior history. Dr. Zaleski asked that the request be reduced to writing. By letter dated July 30, 1986, respondent

requested:

> Would you be kind enough to supply the medical report with reference to the above patient. Kindly confine the report to your treatment and prognosis without reference to the prior history. [See Exhibit J-1 admitted into evidence at the hearing on August 25, 1987.]

By letter to respondent dated August 10, 1986, Dr. Zaleski declined to prepare such a report, stating that it would be "inaccurate and unethical."

Thereafter, in late November or early December 1986, respondent received a letter from Mr. Vanderdrift enclosing a note from the chiropractor. The note discussed a prior history of back pain. Ultimately, Mr. Vanderdrift did obtain a medical report from another doctor making no mention of the prior history.

The ethics committee concluded that respondent violated RPC 3.4(a) when he attempted to conceal material having potential evidentiary value in a personal injury action.

CONCLUSION AND RECOMMENDATION

Upon review of the record, the Board is satisfied that the conclusion of the ethics committee in finding respondent guilty of unethical conduct is fully supported by clear and convincing evidence.

RPC 3.4(a) states:

> A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or counsel or assist another person to do any such act.

Respondent argued before both the committee and the Board that the report he received from Dr. Zaleski contained information that conflicted with what his client had told him concerning his medical history, and that he believed he had the right to rely on what his client had told him. However, respondent's notes from his initial meeting with Mr. Vanderdrift state: "Pre-existing treatment to lower back but this treatment is all to neck" (See Exhibit R-4 introduced into evidence at the hearing on August 25, 1987.) Therefore, respondent knew from his initial meeting with his client that he had experienced previous back problems.

Even assuming that respondent had no initial knowledge of Mr. Vanderdrift's pre-existing condition, his continued reliance upon his client's statement was inappropriate when faced with authoritative evidence to the contrary, namely Dr. Zaleski's report.

In his defense, respondent also argued that his actions occurred prior to the commencement of any litigation in this matter and that RPC 3.4(a) therefore does not apply. Respondent's argument is unpersuasive. RPC 3.4(a) clearly applies, notwithstanding the fact that suit had not yet been instituted. It is clear that respondent wished to obtain the new report in anticipation of litigation. The spirit of the rule would be defeated if what is not permitted during litigation would be allowed merely because no complaint has yet been filed.

Respondent argued that the violation of the rule was not consummated because he did not actually use the report. The Board

disagrees. The violation occurred at the time that respondent requested the new report from Dr. Zaleski. Had the altered report been used during litigation, respondent would have committed a more serious ethical infraction. Use of the report would have constituted fraud upon the court, for which more severe discipline should be imposed.

In all disciplinary matters, the quantum of discipline must accord with the seriousness of the misconduct in light of all circumstances. In re Nigohosian, 88 N.J. 308, 315 (1982). Aggravating and mitigating factors are, therefore, relevant as part of the circumstances of the violation. In re Hughes, 90 N.J. 32, 36 (1982). In mitigation, the Board notes that respondent admitted that he demonstrated poor judgment in this action.

The Board notes as an aggravating factor that respondent was privately reprimanded in 1976 for improper trial conduct and making false accusations against a judge. Therefore, the requisite majority of the Board recommends that respondent receive a public reprimand. One member dissented believing that there was no violation of RPC 3.4(a). Three members did not participate.

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

Dated: 11/7/85

By: Raymond R. Trombadore
Chair
Disciplinary Review Board