SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-316
District Docket No. VA-2011-0007E

IN THE MATTER OF

HERBERT JONI TAN

AN ATTORNEY AT LAW

Decision

Argued: November 21, 2013

Decided: December 10, 2013

Susan M. Singer appeared on behalf of the District VA Ethics Committee.

Respondent waived appearance for oral argument.

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

This matter was originally before us at our September 19, 2013 session, on a recommendation for an admonition filed by the District VA Ethics Committee (DEC). At that time, we determined to treat the recommendation for an admonition as a recommendation for greater discipline, pursuant to R. 1:20-15(f).

The two-count complaint charged respondent with having violated RPC 1.4 (failure to communicate with a client) (no subsection cited) and RPC 8.1(b) (failure to comply with a lawful demand for information from a disciplinary authority). Thereafter, the DEC presenter withdrew the second count of the complaint charging the RPC 8.1(b) violation. For the reasons expressed below, we determine that a reprimand is warranted in this case.

Respondent was admitted to the New Jersey bar in 1998. He maintains a law office in Newark, New Jersey.

On October 17, 2006, respondent received a reprimand for knowingly making a false statement of fact in connection with a bar admission application. Specifically, he falsely stated, on his bar application, that he had earned a bachelor's degree, when he was one course shy of that degree. In determining that a reprimand was sufficient discipline, we considered that respondent and his fiancée were facing health problems at the time, that he twice attempted to rectify the problem (although he failed to follow through for fear of discovery); that his misrepresentations were the result of poor judgment and inexperience; and that the offense had occurred more than eight years earlier. In re Tan, 188 N.J. 389 (2006).

Respondent received another reprimand, in 2010, for misconduct in two client matters. There, he failed to fully cooperate with ethics authorities in both matters and, in one of them, lacked diligence and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions about the representation. As a result, the client did not understand the scope of the representation or the consequences of her choice on how to proceed in the matter. In re Tan, 202 N.J. 3 (2010).

In 2011, respondent was censured for gross neglect and lack of diligence in a workers' compensation matter, failure to abide by the client's decisions concerning the scope and objectives of the representation, failure to keep the client reasonably informed about the status of the case or to comply with the client's reasonable requests for information about the case, failure to explain a matter to the extent reasonably necessary for the client to make informed decisions about the representation, and misrepresentations to the client. In re Tan, 208 N.J. 362 (2011). The Court ordered respondent to practice under the supervision of a proctor for a two-year period.

On November 20, 2013, respondent was temporarily suspended for failure to submit to the Office of Attorney Ethics, the name

of a supervising attorney, as required by the Court order of November 3, 2011.

In 1995, grievant Elsie Metoyer, a corrections officer at the Hudson County Correctional Center (HCCC), suffered medical problems, as a result of which her physician ordered that she work, at maximum, an eight-hour day. Subsequently, Metoyer was allegedly disciplined for failure to perform mandatory overtime work and then pressured to accept disability retirement.

In January 2005, Metoyer retained respondent in connection with a claim for wrongful termination of employment. In June 2006, respondent amended an existing complaint to join Metoyer as a plaintiff in a lawsuit against HCCC. The complaint alleged, among other things, that HCCC had failed to accommodate Metoyer's disability and that she had been wrongfully discharged or forced to retire, in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

In 2006, the Social Security Administration declared Metoyer disabled as of December 1, 2005 and entitled to disability benefits, beginning in May 2006. She was ineligible to return to work.

On May 8, 2007, Metoyer's case was scheduled for trial. Respondent informed her that they could "roll the dice" and go before the jury that had already been seated or accept a

settlement. Metoyer stated that she had been dissatisfied with the $47,500 settlement offer, because it did not compensate her for pain and suffering, but agreed to the settlement, even though she thought that her case was worth more. She believed that, after HCCC had made several offers, $47,500 would be its final offer. In addition, according to Metoyer, respondent had told her that it was a good settlement.

At the time of the settlement, Metoyer believed that respondent would file a second action against HCCC for pain and suffering and for punitive damages. She did not understand why respondent had not simply pursued that portion of the case right then. Respondent, however, had told her not to worry about it.

Respondent's position was that, on the day of the settlement, he never discussed with Metoyer the possibility of filing a second case or pursuing another cause of action. He added that Metoyer had never expressed her concerns about the lack of punitive damages or emotional distress damages. Even if she had, however, he would still have recommended the settlement because "under LRB punitives are the exception . . . not the norm . . . [H]er front wages were already cut off based on the disability," and HCCC was aware that she was already receiving disability benefits.

At the DEC hearing, when respondent questioned Metoyer about her understanding of the basis for the settlement, she replied that it was "never [for] pain and suffering, punitive damage[s], because you told me you would file it later." She understood that the settlement was only for "[h]ow they got rid of me."

Respondent claimed that the settlement had not been allocated towards anything in particular. He stated, "[i]f it had been for lost wages, "you're required to do withholding." Respondent could not dispute Metoyer's understanding of the settlement, but recalled trying to explain it to her.

Metoyer testified that, after she received the settlement proceeds, she began calling respondent about the status of the second action. She claimed that, from 2007 to 2011, she had tried to call him between seventy-five and 100 times, but had received only a few replies from him. Metoyer asserted that, on some days, she called respondent's office two or three times and was told that he was out of the office, or out to lunch, or with a client, or in court. She also testified that she called respondent "a thousand times," but he did not return her calls. She later acknowledged that she may have exaggerated the number of calls she had made, but insisted that she had called him "a whole lot of times" and that he had returned only three or four

calls. Metoyer also recalled visiting respondent at his office twice, between May 2007 and May 2011, once to sign the retainer agreement and a second time to pick up the check for the settlement proceeds. Shortly after she filed the grievance, respondent communicated with her more frequently.

Respondent, in turn, asserted that Metoyer had exaggerated the number of times she had called him. He estimated that she had called around twenty times. He added that Metoyer had been his client for a long time and that he liked her a lot, but that she had trouble understanding "certain things." He claimed that he tried to explain things to her to the best of his ability. He could not document the number of the telephone conversations they had and did not send her any letters to memorialize their conversations.

Metoyer and respondent entered into a second retainer agreement, dated April 3, 2008,[1] for an action against Metoyer's union and the then-union president, for improperly representing her. According to respondent, in April 2008, he had been on good terms with the then-union president, with whom he was trying to negotiate a refund of Metoyer's union dues, without filing a lawsuit. According to respondent, he had informed Metoyer that

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[1] The retainer called for a non-refundable retainer of $4,000, with a $500 deposit, and monthly payments of $200.

he was trying to reach an amicable resolution with the union. He noted that, by the time Metoyer had contacted him, in April 2008, her State law claims had long been time-barred. He, therefore, had to pursue whatever theories he had available.

Metoyer filed a grievance against respondent almost three years after she had signed the second retainer agreement. By letter dated April 29, 2011, the DEC sought a reply to it. Thereafter, in May 2011, respondent filed a complaint for breach of contract against Metoyer's former union and the former union president, in the United States District Court for the District of New Jersey.

Respondent blamed the delay in filing the complaint on his going "back and forth" with the former union president, trying to reach a settlement. When he finally filed the complaint, the union president had been replaced. He, thereafter, had no more communications with the union. Respondent admitted that Metoyer's grievance was part of the reason that he had filed the complaint.

On May 29, 2012, Metoyer's complaint was dismissed for lack of jurisdiction. Metoyer testified that she was unaware that respondent had filed the complaint or that it had been dismissed, because respondent had provided her with neither oral nor written information about it. Respondent admitted that he

never wrote to Metoyer about the status of her matter, but he recalled sending her a copy of the order of dismissal and advising her of her right to appeal that determination. He conceded that the chances of success on such an appeal were "next to none." He claimed that he had tried to call Metoyer about it, but that no one had answered her phone.

The DEC left the record open to permit respondent to provide (1) any correspondence that he had sent to Metoyer about the order of dismissal, (2) a copy of the first retainer agreement, and (3) any records of telephone calls to or from Metoyer.

The DEC's March 11, 2013 hearing report made no reference to any supplemental documents from respondent. The DEC found violations of RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter or to promptly comply with reasonable requests for information) and RPC 1.4(c) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation). The DEC recommended an admonition, notwithstanding respondent's disciplinary history.

At oral argument before us, the presenter noted that respondent did not supplement the record with any documentation. The presenter remarked that, because of the nature of

respondent's law practice, he did not want to pursue litigation against the union. She emphasized that the lawsuit that respondent eventually filed was "doomed from the onset" and was dismissed for failure to state a claim for which relief could be granted.

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

While Metoyer may have been prone to exaggeration, even respondent admitted that she called him about twenty times. Although the DEC left the record open to permit respondent to submit documentation to establish that he had called Metoyer, he provided no such documentation. Metoyer testified credibly that she was unaware that respondent had filed a second complaint on her behalf and that the case had been dismissed. For his part, respondent did not submit any documentation to support his assertion that he had mailed copies of the complaint and the dismissal order to Metoyer. We find, thus, that respondent violated RPC 1.4(b) for his failure to communicate the status of the matter to Metoyer. We do not find clear and convincing evidence, however, that respondent's conduct violated RPC 1.4(c). Nothing in the record demonstrates that he did not

explain in detail, the circumstances of the matter to Metoyer to allow her to make an informed decision on how to proceed.

If respondent had no ethics history, an admonition would have been appropriate discipline for his failure to keep Metoyer apprised about the status of her matter. See, e.g., In the Matter of John David DiCiurcio, DRB 12-405 (July 19, 2013) (violations of RPC 1.4(b) and RPC 1.3); In the Matter of Thomas E. Downs, IV, DRB 12-407 (April 19, 2013) (violations of RPC 1.4(b) and RPC 8.1(b)); In the Matter of Peter A. Cook, DRB 12-331 (January 25, 2013); In the Matter of Ronald L. Washington, DRB 12-138 (July 27, 2012) (violations of RPC 1.4(b), RPC 1.4(c), and RPC 8.1(b)); In the Matter of Fernando Iamurri, DRB 12-407 (July 25, 2012) (violations of RPC 1.4(b), RPC 1.1(a), and RPC 1.3); and In the Matter of Na-Kyung, DRB 11-434 (May 23, 2012) (violations of RPC 1.4(b) and RPC 1.3).

Only attorneys DiCiurcio and Iamurri had disciplinary histories, a reprimand and an admonition, respectively. Both forms of discipline were imposed for unrelated ethics infractions. In addition, both of those attorneys presented mitigating circumstances.

Respondent, in turn, has an ethics history for similar types of misconduct and has offered no mitigation. His 2010 reprimand involved a failure to explain a matter to the extent

necessary to permit the client to make informed decisions about the representation, as well as failure to cooperate with ethics authorities and lack of diligence. His 2011 censure stemmed from his failure to keep the client reasonably informed about the status of the representation or to comply with the client's requests for information, failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation, failure to abide by the client's decisions about the scope and objectives of the representation, gross neglect, lack of diligence, and misrepresentations to the client. Only his first reprimand, in 2006, was rooted in unrelated conduct.

Given respondent's ethics history, we find that an admonition is not sufficient discipline. He has not learned from his prior errors. The grievance in the matter for which he received a censure in 2011 was docketed in July 2009. Having been on notice that his conduct was under scrutiny by ethics authorities, he should have been more mindful of his ethics responsibilities and should have been more responsive to Metoyer's requests for information about her case. He failed to reply to the numerous telephone calls that she made between the time of the settlement in her first case and the date on which she filed the grievance against him. After she filed the

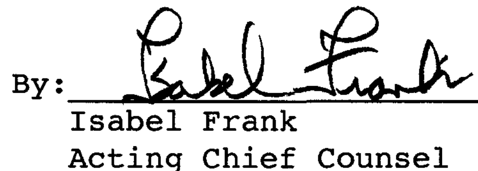
grievance, respondent became more responsive and filed a complaint, which was ultimately dismissed.

Based on the obvious conclusion that respondent has not paid heed to his prior ethics mistakes, as evidenced by his disciplinary record, we determine that a reprimand is the suitable sanction for his sole violation of RPC 1.4(b).

Member Gallipoli did not participate. Members Singer and Hoberman abstained.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

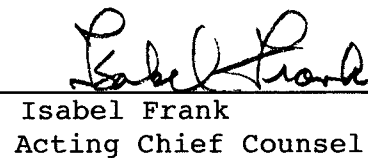
In the Matter of Herbert J. Tan
Docket No. DRB 13-316

Argued: November 21, 2013

Decided: December 9, 2013

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Abstained	Did not participate
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Gallipoli						X
Hoberman					X	
Singer					X	
Yamner			X			
Zmirich			X			
Total:			6		2	1



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