SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-070
District Docket No. VB-03-016E

IN THE MATTER OF

DENNIS A. CIPRIANO

AN ATTORNEY AT LAW

Decision

Argued: April 20, 2006

Decided: June 6, 2006

Raymond Hamlin appeared on behalf of the District VB Ethics Committee.

Richard Sapinski appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (reprimand) filed by the District VB Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1966. On October 20, 1975, he received a public reprimand for a conflict of interest. In re Cipriano, 68 N.J. 398 (1975).

The formal ethics complaint in the present case alleged that respondent grossly neglected a litigation matter and lied to the client about the status of her case.

The complaint charged violations of RPC 1.1(a) (gross neglect), RPC 3.2 (failure to expedite litigation), RPC 1.4(a) (failure to communicate with the client), RPC 8.4(c) (deceit and misrepresentation) and R. 1:20-3(g) (3), more appropriately RPC 8.1(b) (failure to cooperate with ethics authorities).

On July 21, 1999, Patricia Ruland (alternately identified in the record as "Roland") retained respondent to file suit under the Americans with Disabilities Act ("ADA"). She gave respondent a $5,000 retainer, pursuant to a written fee agreement.

In November 1999, respondent filed a complaint on Ruland's behalf in the United States District Court for the District of New Jersey ("USDNJ"). According to the complaint, Ruland's employer, the Shore Regional High School Board of Education, and a supervisor, Leonard Schnappauf, the defendants, subjected Ruland to discrimination, based on a handicap – a chronic back condition and pain from a mastectomy. Ruland had requested a special-order workstation to accommodate her condition, but her supervisor denied her request. The complaint had separate counts

for harassment and defamation, outrage, breach of contract, and loss of consortium.

Between December 1999 and April 2001, the federal case proceeded apace. Respondent and the defendants engaged in discovery, including the production of interrogatories and answers to interrogatories, the retention of experts, and the taking of depositions.

The record contains ample evidence, and the parties do not dispute, that respondent was diligent in the representation and in his communications with Ruland, during this time frame.

It was later that the case began to go "off the tracks." On April 23, 2001, at a pre-trial conference, the judge commented that he saw no merit to Ruland's claims and urged the parties to settle the matter. Respondent was present at the conference, but Ruland was not.

In an April 23, 2001 letter to his client, respondent advised Ruland that the defendants would likely move for summary judgment, which "motions are typical and common," and that the case would require a five-day trial. He failed to inform her of the judge's advice to settle and of the court's negative inclination toward her claims.

On May 7, 2001, respondent sent Ruland another letter, advising her that defendants had filed their motion for summary

judgment, to be decided on June 11, 2001. Respondent's letter also informed Ruland that he was preparing a defense to the motion and a certification for her signature. The letter was silent about the relative merits of her claims.

On May 30, 2001, respondent sent a letter to the court, with a copy to Ruland, confirming his understanding that there would be oral argument on summary judgment motion. Respondent, however, submitted no written opposition to the motion.

Shortly thereafter, the court determined to review the matter at a later date, without oral argument. On July 30, 2001, John P. Duggan, counsel for defendants, confirmed the change in a letter to the court, with a copy to respondent. That letter noted that the matter was to be considered as "unopposed," because respondent had not filed any opposition. The record is clear that respondent did not forward a copy of Duggan's letter to his client, or tell her at the time that he had not filed an opposition to the motion.

Duggan testified at the DEC hearing that, thereafter, respondent requested additional time to file a reply to the motion. He recalled respondent telling him that he "was having difficulty finding a basis for opposing it." According to Duggan,

> [t]he big thing was during the course of the litigation, the Third Circuit came down with

> a decision in a case, Martelli [sic], right on the ADA which really there had been some divergence in opinion as to what constituted a disability and the Martelli [sic] opinion was very strong in the defendant's favor as to the nature – as to what can be claimed as a disability.
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> [T31.][1]

As an accommodation to respondent, on August 16, 2001, Duggan withdrew and re-filed the motion, in order to give respondent more time to formulate a response. Duggan stated that Ruland's case was so weak that he did not mind giving respondent additional time to reply to the summary judgment motion.

Respondent never opposed that motion, which was granted on March 26, 2002. However, respondent denied that his actions amounted to gross neglect of the litigation. Rather, he claimed that he had intended to oppose the motion, but could not do so after reading Duggan's summary judgment materials. In that submission, he learned that the Third Circuit Court of Appeals had decided a similar case, Marinelli v. City of Erie, 216 F.3d 354 (3d Cir. 2000), and had expressly rejected an ADA claim for the same injuries suffered by Ruland.

Respondent claimed that, once he read Marinelli, he could not file a good faith argument in opposition to Duggan's motion. In fact, respondent continued, if Marinelli had been decided

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[1] T refers to the transcript of the October 20, 2005 DEC hearing.

when he first interviewed Ruland, he might not have taken the case.

Between August 2001 and March 2002, the parties awaited the court's determination on the summary judgment motion. Finally, on March 26, 2002, the Honorable Katharine J. Hayden, U.S.D.J., issued a written opinion granting summary judgment to defendants and dismissing Ruland's federal claims.

On August 7, 2001, before the motion was considered, Ruland wrote to respondent for information about her case and expressed some "hope" that it would soon be resolved. After receiving this letter, respondent spoke to Ruland by telephone. According to respondent, he did not reveal the weakness of her case because he did not want to upset her. She had confided in him that she was caring for her mother "with dementia" and for her alcoholic husband. According to respondent, he did not have the heart to tell Ruland, at that time, that her case was so weak as to preclude a good faith reply to the summary judgment motion.

Thereafter, respondent failed to advise Ruland that he had not opposed the motion. Instead, he made vague statements in correspondence to her. According to respondent's counsel,

> [h]e explained that all the facts supporting her case would be before the Court in ruling on the motion. He believed this to be a true statement, as Ruland's deposition testimony (the only evidence supporting ant of her claims) and her employment records were

> exhibits to Duggan's motion [citation deleted] and the medical reports were exhibits to the Pretrial Order. Respondent did not tell Ruland that he could not file a brief in response to the Motion but did not feel it was inaccurate to tell her that whatever evidence there was in her favor was before the Court.
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> [Rb6.][2]

From August 2001 on, Ruland awaited news from respondent about the outcome of the summary judgment motion, but little was happening in the case. She wrote to respondent in October 2001, and he replied, on October 12, 2001, that he was awaiting court action.

As previously noted, on March 26, 2002, Judge Hayden issued an opinion granting summary judgment to defendants. On March 28, 2002, respondent wrote to his client enclosing the opinion, informing her of the outcome and advising her to contact him about her remaining state court claims.[3] Ruland believed that the

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[2] "Rb" refers to respondent's November 10, 2005 letter-brief to the DEC.

[3] Although the original opinion, as delivered to the DEC by respondent, included the lead sentence, "This case comes before the Court on defendants' motion for summary judgment, which is unopposed," the DEC found another copy of the opinion in respondent's file, in which the words "which was unopposed" had been deleted from the sentence. Respondent was not asked if he had personally redacted those words from the opinion. He did not recall if he had sent his client a redacted copy. There is no indication in the record that an altered copy was used for any purpose. Ruland did not recall whether she had received a copy of the opinion from respondent.

significant lapse of time during which respondent did not communicate with her was attributable to his neglect of her matter, including the year-long period wait for the court to decide the summary judgment motion. Respondent never advised Ruland about any reservations he had that would have prevented him from opposing the summary judgment motion.

Finally, Ruland claimed that she called respondent about thirty-five times for information about how to proceed with the case after the dismissal of the federal claims, but that respondent did not reply to her requests for information.

Concerned about respondent's failure to contact her, Ruland employed a family friend and attorney, David C. Roberts, who contacted the court. Roberts obtained Judge Hayden's opinion and explained it to Ruland in detail. Ruland recalled learning from Roberts, not respondent, "that my case was – that the defending attorney filed to dismiss charges and my attorney basically in his language agreed with them."

Respondent then sent Ruland a May 24, 2002 letter advising her that he intended to file a motion for reconsideration. He also enclosed a certification for her signature, in support of the motion.

Ruland recalled receiving the letter and certification, believing it to be an indication that her claims were still

viable. Ruland recalled feeling that she was "in the dark" until she received this correspondence, after which she lost her trust in respondent as her attorney.

Roberts, too, recalled his contact with respondent in this regard:

> A. Well, what he told me was this: He told me that the other side had filed for Summary Judgment. He opposed it. It was denied – the Summary Judgment Motion was granted and that he was – he had filed a Motion for Reconsideration and was waiting for a decision from the judge. He went on about how the judge was just sitting on it and he was waiting for her decision. So I asked him if he can send a copy of the Motion for Reconsideration papers.
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> Q. And did that happen?
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> A. Yes, he did send me a copy. But then when I got the copy of the reconsideration papers I noticed that they were unfiled. And because of what Mrs. Roland [sic] had told me about his unresponsiveness and the way he didn't respondent to me when I first called, I don't know, something made me a little suspicious. I said, Can you send me a copy of the filed papers. And then he said he would and they didn't come so I called again. He wouldn't take my call. I asked his office, I said, I'm waiting for a copy of the filed papers. They never came so I called the Court and I said I want – I'd like to, you know, verify that this Motion for Reconsideration was filed and was pending before the Court. And I don't remember who I spoke with at the Court. It was obviously not the judge. The clerk or secretary, they looked at the docket, they may not have looked at it at that particular moment. I believe they may have called me

> back and said no Motion for Reconsideration was ever filed. And then that was the first time that I learned not only was no Motion for Reconsideration ever filed but no opposition to the Motion for Summary judgment was ever entered. The person on the phone actually made a joke about how can you reconsider something that you didn't oppose. I said, That's a very good question but that's not a question for me to answer.
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> [T112-23 to T114-11.]

Thereafter, respondent and Roberts negotiated a settlement of a potential malpractice claim. According to Roberts, respondent pressed him for a provision in the agreement that no ethics grievance would be filed against him. Roberts advised respondent that such a provision would be unenforceable. The final agreement contained no provision about an ethics grievance.

In September 2002, after negotiations with Roberts regarding a malpractice claim, respondent refunded Ruland's $5,000 retainer, $5,000 in advanced costs, and $5,000 to release himself from any malpractice claim against him, for which he was self-insured.

Respondent conceded that he never filed a motion for reconsideration in the matter, testifying that it was Roberts's idea, not his own, to prepare the certification for Ruland:

> Because [Roberts] made it – he said to me why don't you prepare a Motion for Reconsideration. It'll satisfy her and it'll

> get her off my back. So I decided I would do it. I prepared only the Certification and I think I sent a copy of it to him. I'm not sure because my letter doesn't show a copy to him. I don't think I did as a matter of fact. I know he was wrong when he said I sent him a copy of the motion. I never sent the motion because I never prepared it.
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> [T203.]

Respondent's counsel's brief to the DEC asserted that respondent felt pressure from Roberts to settle a potential malpractice claim. Respondent prepared the certification, which he considered "a frivolous pleading," under duress, as part of a forced settlement offer by Roberts, "who he felt was acting unethically." Upon reflection, respondent decided not to file it.

Shortly thereafter, Ruland filed the ethics grievance.

The DEC dismissed the charges related to neglect (RPC 1.1(a) and RPC 3.2)), finding that respondent had properly prosecuted the matter up until the motion for summary judgment. The DEC believed respondent, that "he had an ethical duty *not* to file papers with the court that would have advocated a position contrary to the law."

The DEC found respondent guilty of failure to communicate, insomuch as he failed to advise his client about his deep reservations concerning her federal claims. The DEC also found respondent guilty of misrepresenting to Ruland "and others who

contacted him on her behalf" (presumably Roberts) (1) that he had filed an opposition to the motion for summary judgment and (2) that he intended to file a motion for reconsideration.

Although respondent ultimately cooperated with the DEC by filing an answer and participating at the hearing, the DEC found that respondent failed to cooperate with ethics authorities during their investigation of the grievance (RPC 8.1(b)).

The DEC recommended that respondent be reprimanded, citing In re Kasdan, 115 N.J. 472 (1989) (misrepresentation of the status of the case merits a reprimand).

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

Respondent could have avoided all of the ethics infractions in this matter simply by being upfront with his client. Unfortunately, he elected not to give his client the full story about her case.

First, some of the allegations against respondent are unsupported by the record. With regard to the RPC 1.1(a) and RPC 3.2 allegations, the DEC correctly dismissed those charges, as respondent did not neglect Ruland's suit. Rather, he represented her diligently in the litigation until he learned about the Marinelli case. We conclude that the DEC was correct that

respondent could not thereafter, in good faith, prosecute the litigation.

However, respondent handled the matter poorly in other respects, and violated the RPCs in the process. Respondent violated RPC 1.4(a), as alleged. Respondent initially kept his client informed while the complaint was pending, until late 2001. Although the case was dormant thereafter, through early 2002, respondent was not free to ignore Ruland. She testified to over thirty telephone calls requesting a status update, none of which received a reply. Respondent presented no evidence to refute Ruland's allegation in this regard. He should have periodically advised her, during that time, that he was still awaiting the court's determination. Respondent's failure to advise his client of the status of her matter was a violation of RPC 1.4(a).

However, a more serious failure to communicate permeated the representation, under RPC 1.4(b). Respondent kept his client in the dark about aspects of the case. At the time of the events herein, RPC 1.4(b) stated that "a lawyer shall explain a matter to the extent reasonably necessary for the client to make informed decisions regarding the representation."

First, in April 2001, respondent failed to advise Ruland that the judge thought that Ruland's case was weak and should be

settled. Respondent then failed to disclose his serious reservations about the strength of her case, which he held as early as May 2001 – reservations so serious that he felt compelled to file nothing in response to the summary judgment motion.

Respondent's explanation – that he was afraid to upset his client with unwelcome news – is not a defense to the misconduct. Respondent had an affirmative duty under the rules to keep his client adequately informed about these major aspects of her case – information that might have changed her course of action. By failing to keep Ruland so informed, respondent violated RPC 1.4(b).

Respondent also violated RPC 8.4(c) by making misrepresentations to both Roberts and Ruland, and by attempting to deceive Ruland.

Roberts testified that respondent misled him from the start, falsely stating that he had filed a reply to Duggan's summary judgment motion. Thereafter, respondent tried to cover up his inaction by preparing and sending to his client a certification in support of a reconsideration motion. Roberts was surprised to later learn from the court that respondent had never opposed Duggan's motion, wondering why respondent would create reconsideration papers for his client's signature, when

they could not be filed in good faith because no submissions had been made in defense of the original motion. Roberts was correct in stating that there was nothing for the court to reconsider, as respondent had offered nothing on the first go around.

Respondent also hid the truth from Ruland. He admittedly never advised her, despite her repeated requests, that he had not opposed the summary judgment motion. It is well-settled that "[i]n some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984). Respondent misrepresented by silence his handling of the defendant's summary judgment motion, which was unopposed. He also misled Ruland that her claims had merit, after he knew that they were unsustainable. By maintaining his silence, respondent violated RPC 8.4(c).

Respondent's actions were further intended to deceive Ruland about the reconsideration certification. Respondent admitted to ethics authorities that he had not intended to file the certification with the court. He could not, never having opposed the motion. While there is probably some truth to respondent's assertion that the certification was designed to get Ruland "off his back," there is no support for the blame ascribed to Roberts – that he was somehow liable for respondent's preparation of that certification. The fact that

respondent did not file the certification does not prevent us from making a finding in this situation. The certification was presented to, and returned signed by, his client. In truth, respondent alone is to blame for this deceitful conduct, which we consider a further violation of RPC 8.4(c).

Finally, the complaint charged respondent with failure to cooperate with ethics authorities (RPC 8.1(b)). Although respondent was not cooperative at the initial stages of the ethics proceedings, he later filed a timely answer, turned over his file to ethics investigators and, with the aid of counsel, cooperated with the ethics authorities thereafter. We have taken a benevolent stand where attorneys ultimately cooperate with the disciplinary system. Therefore, we dismiss the RPC 8.1(b) charge.

In mitigation, respondent offers only the questionable claim that he always had his client's interest in mind, whom he sought to spare from the bad news of weaknesses in her case.

In aggravation, respondent has a prior public reprimand, albeit a very old one, from 1975.

In summary, the charges related to RPC 1.1(a), RPC 3.2 and RPC 8.1(b) should be dismissed. Respondent is guilty of failure to keep his client adequately informed about the case (RPC 1.4(a)), to explain the matter in detail to allow her to make

informed decisions about the representation) (RPC 1.4(b)), and deceit and misrepresentation (RPC 8.4(c)).

The Court "has consistently held that intentionally misrepresenting the status of lawsuits warrants public reprimand." In re Kasdan, 115 N.J. 472, 488 (1989). This is typically the discipline imposed even where, in addition to the misrepresentation, the attorney has engaged in gross neglect, lack of diligence and failure to communicate with the client – so long as the attorney has not defaulted and has no ethics history. See, e.g., In re Wiewiorka, 179 N.J. 225 (2004) (attorney reprimanded for gross neglect, lack of diligence, failure to communicate with the client, and conduct involving dishonesty, fraud, deceit or misrepresentation in one client matter, where he was hired to investigate a personal injury claim for the purpose of a possible lawsuit but failed to return phone calls and told the client that he had filed suit when he had not, and the statute of limitations had expired); and In re Porwich, 159 N.J. 511 (1999) (reprimand imposed upon attorney who admitted to gross neglect, pattern of neglect, lack of diligence, failure to communicate with the client, and failure to cooperate with ethics authorities in two client matters; the Court also found that the attorney engaged in conduct involving misrepresentation, based on the attorney's representation to the

client that he had filed suit, when he had not).

Here, respondent did not default and his prior discipline is a thirty-year-old public reprimand for unrelated misconduct (conflict of interest). We, therefore, find no reason to depart from precedent and determine to impose a reprimand for respondent's unethical conduct. Vice-Chair Pashman did not participate.

We also require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
William J. O'Shaughnessy,
Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dennis A. Cipriano
Docket No. DRB 06-070

Argued: April 20, 2006

Decided: June 6, 2006

Disposition: Reprimand

| Members | Suspension | Reprimand | Dismiss | Disqualified | Did not participate |
|---|---|---|---|---|---|
| O'Shaughnessy | | X | | | |
| Pashman | | | | | X |
| Baugh | | X | | | |
| Boylan | | X | | | |
| Frost | | X | | | |
| Lolla | | X | | | |
| Pashman | | X | | | |
| Stanton | | X | | | |
| Wissinger | | X | | | |
| Total: | | 8 | | | 1 |

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