SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-050

IN THE MATTER OF

JAMES H. WOLFE, III

AN ATTORNEY AT LAW

Decision

Argued: April 13, 2000

Decided: October 18, 2000

Judith B. Appel appeared on behalf of the District VA Ethics Committee.

Kirk Douglas Rhodes appeared on behalf of respondent.

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

This matter was originally before us in September 1997 as a default, at which time the Board determined to impose a three-month suspension. The Court ordered a three-month suspension in March 1998. After consideration of respondent's petition for review, the Court vacated that order of suspension and remanded the matter to the District VA Ethics

Committee ("DEC") for a hearing. This matter is now before us for a de novo review, following a hearing before the DEC.

A three-count 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 communicate with client) (count one); RPC 1.3 and RPC 1.4(a) (count two); and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority) (count three).

Respondent was admitted to the New Jersey bar in 1979. At the relevant times he maintained a law practice in Newark, New Jersey. In 1998 he received an admonition for failure to advise his clients of the status of their matter, in violation of RPC 1.4(a). In the Matter of James H. Wolfe, III, Docket No. DRB 98-098 (April 27, 1998). In August 1999, we determined to suspend him for three months for violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate with client). In the Matter of James H. Wolfe, III, Docket No. DRB 99-022 (August 23, 1999). That matter, which was transmitted to the Court in September 1999, was remanded to us in July 2000 for reconsideration of the discipline imposed. Following reconsideration, we unanimously determined to impose a reprimand for respondent's misconduct. That matter is awaiting the Court's review.

For unknown reasons, the hearing panel's public member recused himself from the case, after testimony had already been taken at the DEC hearing. The two remaining members determined to proceed with the case, as permitted by R. 1:20-6(a)(2). This rule

provides, in relevant part, that three members of a hearing panel shall constitute a quorum and that the hearing panel shall act only with the concurrence of two. The rule further provides the following:

> When by reason of absence, disability or disqualification the number of members of the hearing panel able to act is fewer than a quorum, the following procedures will apply:
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> * * *
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> (C) if all the evidence has been received, the matter may be determined by the remaining two hearing panel members, provided their decision is unanimous.

The two remaining panel members concurred in their decision.

* * *

The Jackson Matter

Respondent admitted many of the allegations in the complaint and stipulated to other facts at the DEC hearing. In the Jackson matter, respondent admitted the violations charged in the complaint, but claimed that he was unaware of what had transpired in the case, because another attorney purportedly had taken control of the file after respondent's firm had merged with another firm sometime in 1993. The following facts were culled from the testimony, from respondent's admissions and from stipulations at the DEC hearing:

Arthur Jackson retained respondent in March 1991 to represent him in a medical malpractice matter.[1] Respondent filed suit in May 1992. Thereafter, the defendants filed a

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[1] Prior to that, respondent had represented Jackson in a personal injury claim.

motion to compel Jackson to provide an expert's report. On July 25, 1993 the motion, which proceeded unopposed, was granted. Jackson was ordered to produce an expert's report within thirty days. When neither respondent nor anyone from his firm obtained a report, the defendants filed a motion for summary judgment on July 1, 1993. Respondent alleged that he had no knowledge of the motion, which also proceeded unopposed.

On October 15, 1993 the complaint was dismissed with prejudice. Although respondent did not object to the motion for summary judgment, the Jackson file contained a certification in opposition to the motion. The certification, dated October 7, 1993, indicated that respondent was the plaintiff's attorney, that he had retained an expert on September 1, 1993 and that the expert would submit a report by mid-October. The certification was not signed, but contained a line for respondent's signature.

Respondent claimed that he did not prepare the certification and was not aware of its existence. He also contended that he did not see any of the papers relating to Jackson's case, after the purported transfer of the medical malpractice files to another attorney in his firm.

Approximately one and one-half years later, on April 20, 1995, Jackson wrote to respondent requesting information about the status of his case. Respondent failed to reply to Jackson's letter. Jackson then filed a grievance in September 1995. Approximately six months later, on March 26, 1996, respondent wrote the following letter to the Jacksons:

> I recommend that you retain an attorney, as you may have a legal malpractice action against the firm. The complaint filed on your matter was dismissed by

the Court for failure to provide an expert report and for failure to answer interrogatories.

Although your file was to be handled by someone else in my office, as I had stopped handling medical malpractice claims, because you are my clients and our prior relationship, I assume full responsibility. I deeply and humbly apologize for this occurrence.

Please retain another attorney and have him contact me. I am writing my malpractice carrier to put them on notice of your potential claim.

[Exhibit P-29]

As an explanation for his inaction in this matter, respondent testified about the difficulties that had ensued after the 1993 merger of his firm, "Lofton and Wolfe;" with the law firm of "Brown and Childress." Respondent claimed that, following the merger, it was decided that he would no longer handle medical malpractice or personal injury cases. According to respondent, responsibility for those cases had been transferred to another attorney, without any notice to the clients. Since nothing in respondent's files memorialized that change, he had remained the attorney of record in the Jackson matter. Respondent and several other witnesses testified about the other attorney's poor "work ethics," implying that the inactivity on the Jackson file was that attorney's fault.

Jackson testified that, from 1992 through 1995, he had very little contact with respondent. He claimed that he had attempted to contact respondent several times and even had gone to his office once or twice, but respondent was too busy to meet with him. According to Jackson, his physician, too, was unable to speak with respondent, despite several attempts. The physician was only able to speak with respondent's secretary. Jackson

testified that the doctor refused to treat him, presumably until the doctor could obtain assurances from respondent that he would be paid for his services.

At the DEC hearing, Jackson stated that he still suffered from problems due to his injuries, but could not afford the necessary treatment.

According to Jackson, prior to these problems, he had no complaints about respondent's work, pointing out that respondent had settled his personal injury case. Jackson's wife expressed her disenchantment with the legal process stating that, "I just hope this doesn't happen to anyone else. Because I think this is very bad. It makes you lose confidence in everybody when somebody does you this wrong." 1T152.[2]

As noted above, the court dismissed Jackson's medical malpractice claim on October 15, 1993. On June 14, 1995 the court dismissed the remaining counts of the complaint, dealing with Mrs. Jackson's claim for emotional distress. That dismissal was based on plaintiff's failure to submit answers to interrogatories.

No testimony was taken on the third count of the ethics complaint, which charged respondent with a violation of RPC 8.1(b), as respondent admitted his wrongdoing in this regard.

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[2] 1T denotes the transcript of the October 7, 1999 DEC hearing.

The Strickland Matter

In July 1993 Marilyn Strickland retained respondent's firm to represent her in a personal injury matter arising from a hit-and-run motor vehicle accident. Strickland was also involved in automobile accidents before and after the July 1993 accident. Respondent's associate had represented Strickland in the earlier accident. The associate's name also appeared on the retainer agreement for the July 1993 matter.

At the DEC hearing, the associate testified that, because of difficulties with Strickland, she did not want to represent her in the 1993 matter. Respondent, therefore, assumed responsibility for Strickland's case. Respondent filed a personal injury protection ("PIP") claim with State Farm Insurance Company ("State Farm") in May 1994.

Because Strickland had been treated for earlier injuries, the insurance company attempted to determine which injuries had resulted from the hit-and-run accident. After an independent medical evaluation of Strickland by State Farm's physician, Strickland's PIP benefits were terminated as of December 5, 1994. Respondent received notice of the termination, but did not notify Strickland, who became aware of the termination of benefits sometime in June 1995, through one of her treating physicians.

Thereafter, Strickland contacted respondent to discuss the problem. According to Strickland, respondent informed her that she was being "investigated." Strickland claimed that, whenever she telephoned respondent about the status of her benefits, which occurred every "couple of months," he informed her that she was still being investigated. The record

does not disclose whether the investigation was still ongoing at the time of these conversations.

As noted above, following State Farm's denial of benefits, respondent did not contest the insurer's decision and did not notify Strickland of the carrier's determination. Strickland, therefore, continued to receive treatment and incurred a substantial amount of medical bills, which remained unpaid.

As a result of respondent's inaction, Strickland retained new counsel in August 1996. The new attorney testified that, after he assumed responsibility for the Strickland matter, State Farm agreed to recognize Strickland's PIP and uninsured motorist claims and agreed to pay Strickland's bills incurred after December 9, 1994. The new attorney testified that Strickland's physician, Dr. Boiardo, was "difficult" and would not promptly respond to attorneys' requests for information. The new attorney needed a report from Dr. Boiardo to segregate Strickland's injuries from her previous automobile accident. Eventually, after threatening Dr. Boiardo with litigation, he was able to obtain the necessary report.

According to the new attorney, Strickland wanted to file a legal malpractice claim against respondent. She believed that respondent's delay and his failure to keep her informed about the status of her claim deprived her of essential medical treatment, causing her condition to become worse. The new attorney testified about a discussion he had with respondent in April 1999 concerning a prospective malpractice suit. The new attorney notified respondent that Strickland wanted to pursue a legal malpractice claim against him.

The new attorney asked whether respondent had malpractice insurance if such a claim were raised. According to the new attorney, respondent wanted to settle the matter and stated that, "if she just wants a couple of bucks to get rid of this legal malpractice action, I'll give her a few bucks." Respondent offered to give Strickland $1,000 and told the new attorney that Strickland would also have to withdraw the ethics grievance against him. After conferring with his client, the new attorney learned that she was unwilling to withdraw the grievance. Ultimately, Strickland felt that the new attorney and respondent were too "familiar" and, as a result, retained another attorney to pursue her claims.

Respondent, in turn, testified that he had met with Strickland on a number of occasions and that she frequently called to inquire about her case. He also testified that, on several occasions, Strickland had stopped by his office unannounced and that he had been unable to see her because of his heavy caseload.

According to respondent, he was interested in resolving the ethics grievance with the legal malpractice complaint, if possible, but did not intend to do anything improper. He added that settling the legal malpractice claim was not conditioned on Strickland's withdrawal of the ethics grievance.

Respondent's associate also testified in respondent's behalf. She stated that Strickland was a difficult client, who would frequently call about the status of her case or to discuss her treatment with a physician. The associate met with Strickland on several occasions for

scheduled appointments and also had various discussions with her about the delays in her matter.

As to his good character, respondent produced the testimony of two attorneys, one who had acted as his co-counsel in a matter, the other who was in-house counsel to the Newark Board of Education while respondent acted as "outside" counsel. Both attorneys had referred matters to him on occasion. They testified that respondent was a busy attorney who, despite a very heavy caseload, was "responsive," "intelligent" and "hardworking."

Respondent and two attorneys from his former law firm testified about the 1993 merger. They all agreed that, after the merger, it was decided that respondent would no longer handle medical malpractice or personal injury cases. They further testified that respondent's already heavy caseload had increased after the merger. Respondent purportedly worked seven days a week, from early in the morning until late in the evening. He was allegedly under tremendous pressure, both professionally and personally. Respondent testified that, in late 1995, he had taken personal responsibility for the care of his elderly father, who had suffered several strokes and had to be placed in a nursing home. In addition, respondent continued, his sister died in 1996 from complications from a serious illness and around the same time he developed high blood pressure. In addition to these problems, respondent added, after the merger it became apparent that some of the members of the firm were not "pulling their weight." Eventually, in March 1997, the firm dissolved. Respondent

testified that, since the dissolution, he has been practicing on his own without incident and that his office procedures have also improved.

* * *

The DEC found that the Jacksons were unsophisticated, honest people, who had trusted respondent to protect their interests. As to mitigating circumstances, the DEC concluded that respondent's problems had surfaced after his misconduct in the Jackson matter and, therefore, had minimal value. The DEC found that, although allegedly another attorney in respondent's firm assumed responsibility for the Jackson matter after the merger, that happened shortly before the case was dismissed; respondent remained the attorney of record and, therefore, primarily responsible for the ultimate outcome. The DEC, thus, found violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a).

As to the Strickland matter, the DEC found that respondent violated RPC 1.3 based on the long delay in filing a claim for PIP benefits as well as the absence of any evidence that respondent attempted to obtain information from Dr. Boiardo. The DEC, however, did not find a violation of RPC 1.4(a), reasoning that respondent and/or his associate had made reasonable efforts to inform Strickland about the status of her matter. The DEC found that respondent's failure to notify Strickland of the termination of her PIP benefits constituted

lack of diligence, RPC 1.3, instead of failure to keep the client informed about the status of the matter.

Finally, the DEC found that respondent's inappropriate attempt to settle the ethics grievance was more a matter of ignorance of the rule prohibiting such conduct than a conscious attempt to violate it.

The DEC recommended the imposition of a two-year suspension for respondent's conduct in the Jackson matter and a reprimand for his conduct in the Strickland matter.

* * *

Following 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.

The DEC properly found violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a) in the Jackson matter. In fact, respondent admitted those violations. Moreover, other than respondent's testimony that another attorney in his firm was supposed to take over some of respondent's caseload, there was no other evidence presented to bolster this claim. Nevertheless, as noted by the DEC, respondent failed to act even before the attorney was entrusted with the case and failed to follow up on the matter, knowing that the attorney was not performing up to speed.

We are unable, however, to agree with the DEC's findings in the Strickland matter. We do not find a violation of RPC 1.3, as respondent did file a PIP claim in Strickland's behalf. Thereafter, the succeeding attorney was able to have Strickland's PIP and uninsured motorists claims recognized. Also, a majority of the Board found that respondent's failure to inform Strickland that her benefits had been denied was a violation of RPC 1.4(a). It was not until Strickland's doctor informed her of that fact, approximately six months later, that she learned of the denial. We find, thus, that respondent failed to inform his client of this important aspect of her case.

Finally, we are unable to find, for several reasons, that respondent improperly attempted to have Strickland withdraw her ethics grievance, in violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). First, the complaint did not charge such a violation. Second, there were no factual allegations in the complaint to put respondent on notice that he had to defend himself against such a charge. Finally, there was no clear and convincing evidence in the record to deem the complaint amended to include this charge.

We find, thus, that respondent's conduct violated RPC 1.1(a), RPC 1.3 and RPC 8.1(b) in the Jackson matter and RPC 1.4(a) in both the Jackson and Strickland matters.

We now turn to the issue of discipline. We find that the DEC's recommendation for a two-year suspension was excessive. Generally, conduct involving similar violations in one or two matters warrants the imposition of a reprimand. See In re Wildstein, 138 N.J. 48 (1994) (reprimand for gross neglect, lack of diligence in two matters and failure to

communicate in a third matter) and In re Gordon, 121 N.J. 400 (1990) (reprimand for gross neglect and failure to communicate in two matters). Because, however, of respondent's disciplinary record (an admonition in 1998 and, in the recently remanded matter, a reprimand), enhanced discipline is required. We, therefore, unanimously determined that the appropriate discipline for respondent's ethics offenses in these two matters is a three-month suspension. One member did not participate. Two members recused themselves.

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

Dated: 10/18/00

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James H. Wolfe, III
Docket No. DRB 00-050

Argued: April 13, 2000

Decided: October 18, 2000

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling		X					
Peterson						X	
Boylan							X
Brody		X					
Lolla		X					
Maudsley		X					
O'Shaughnessy						X	
Schwartz		X					
Wissinger		X					
Total:		6				2	1

Robyn M. Hill 12/26/00
Robyn M. Hill
Chief Counsel