SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-084

IN THE MATTER OF

JOHN G. MENNIE

AN ATTORNEY AT LAW

Decision

Argued: June 21, 2001

Decided: October 26, 2001

Israel Dubin appeared on behalf of the Committee on Attorney Advertising.

David B. Rubin 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 based on a recommendation for discipline filed by the Committee on Attorney Advertising ("CAA"). The five-count complaint charged respondent with violations of RPC 7.1(a)(1) (making false or misleading communications about a lawyer, the lawyer's services or any matter in which the lawyer has or seeks a professional involvement) (counts one, three and five); and RPC 7.1(a)(2) (making false or misleading

communications likely to create an unjustified expectation about results the lawyer can achieve).

Respondent was admitted to the New Jersey bar in 1986. He maintains a law office in Ocean, New Jersey. He has no history of discipline.

The following facts were culled from testimony at the CAA hearing and a stipulation of facts signed by respondent, respondent's partner and the CAA.[1]

On November 8, 1996 respondent wrote to the CAA, seeking advice on whether two proposed advertisements complied with the rules and asking for suggestions on revisions. One proposed advertisement stated that the attorneys and staff at Shebell & Schibell wished to congratulate respondent "ON THE VERY FAVORABLE VERDICTS THAT HE HAS OBTAINED FOR OUR CLIENTS OVER THE PAST YEAR AND A HALF." The advertisement listed the name of the case, the "offer before trial" and the amount of the "gross jury verdict." Included in a list of six cases was the matter captioned O'Neill v. Critchley, Docket # MON-L-3037-94. The offer received before trial was listed as $50,000 and the gross jury verdict as $7,000,000. The second advertisement essentially congratulated respondent for obtaining a $7,000,000 verdict in the O'Neill matter.

The CAA's reply was that the inquiry had to be submitted pursuant to the procedures outlined in R.1:19A-1 et seq. The CAA's letter underscored the requirement for a brief memorandum of law, citing and discussing the applicable Rules of Professional Conduct and

---

[1] The complaint was filed against both respondent and his partner, but the allegations against his partner were dismissed.

prior opinions of the CAA and Advisory Committee on Professional Ethics and also including a certification that the opinion of the CAA would not affect the interests of any parties to a pending ethics controversy. R.1:19A-3. In addition, the letter stated that the CAA's preliminary review of the proposed advertisements showed that they might be violative of RPC 7.1(a)(1) and (2):

> Specifically, statements regarding past performance may well create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. Therefore, the Committee has held, in a related matter, that the following generic disclaimer should be included in all advertisements making reference to past performance: 'results may vary depending on your particular facts and legal circumstances.' Opinion 15, 98 N.J.L.J. 568 (1975) [sic]. See also Opinion 9, 128 N.J.L.J. 9 (1991) (failure to disclose the existence and nature of a structured settlement in an advertisement concerning past performance constitutes the omission of facts necessary to make a statement considered as a whole not materially misleading).
>
> [Exhibit E to exhibit F]

A jury verdict in O'Neill v. Critchley was issued on September 6, 1996. However, on that same date, the court considered the defendant's motion for a new trial. The court determined that

> [t]he verdict was so grossly disproportionate to the injuries sustained by the plaintiff so as to shock the conscience of the Court. There is no way to sustain the verdict in favor of the plaintiff, and thus, it must be set aside.
>
> * * *
>
> Measured in that light the damages awarded by the jury had absolutely no relationship to its intended purpose. This verdict

> in my view is so grossly excessive as to be, be [sic] unsalvageable and accordingly it would be improper to utilize a remittitur order to save it.
>
> Thus, the verdict in favor of plaintiff is turned aside and a new trial granted. The new trial shall be limited to the issue of damages.
>
> [Exhibit J-2]

On November 1, 1996 the court signed an order setting aside the jury verdict and ordering a new trial on the issue of damages. The order was interlocutory and, therefore, could not be appealed as of right until the entry of a final judgment. R.2:2-3(a)(1). As stated earlier, respondent submitted the advertisement to the CAA on November 8, 1996. On November 13, 1996 respondent filed a motion for leave to appeal, pursuant to R.2:2-4. The motion was denied on December 20, 1996. The case was settled on January 16, 1998 for $175,000.

At some point after February 15, 1997 -- before the settlement of the case and without resubmitting the inquiry to the CAA -- respondent had an advertisement published in the Monmouth County edition of the Bell Atlantic Yellow Pages ("Yellow Pages"). Among other things, the ad included pictures of respondent and his partner, with their names beneath the pictures. The ad also included the statement "OVER THIRTY YEARS OF TRIAL EXPERIENCE." Indeed, at the time the ad was published, the combined years of experience of respondent and his partner totaled thirty-three years. The ad also contained the following statement: "BELOW IS A SAMPLE OF OUR VERDICTS OVER THE PAST TWO YEARS." The ad listed seven cases with the amounts of the "insurance company offer

before trial" and the "gross jury verdict." Leading the list was the case of O'Neill v. Critchley. The ad did not disclose that the jury verdict had been set aside on November 1, 1996. Under the last case there appeared the following disclaimer: "NOTE, RESULTS MAY VARY DEPENDING ON YOUR PARTICULAR FACTS & LEGAL CIRCUMSTANCES." Underneath the cases were the name of the firm, Schibell & Mennie L.L.C., and the statement "A TEAM OF AGGRESSIVE LITIGATORS."

Similar ads were published in the Asbury Park Press on October 18 and 25, 1997. The adds listed the cases by docket number only and stated "Over Fifty Years of Trial Experience." Even though the combined years of experience of the eight attorneys in the firm totaled 144, as noted above respondent's and his partner's totaled only thirty-three. The ad only named respondent and his partner. The complaint, thus, charged that the statement was misleading to the public because neither respondent nor his partner, either individually or collectively, had fifty years of experience.

On July 10, 1997 the CAA received a grievance from the defendant's attorney in the O'Neill v. Critchley matter, questioning whether respondent's advertisement in the Yellow Pages was ethical, in light of the fact that the jury verdict had been set aside. The CAA also received a memorandum from the Office of Attorney Ethics, dated October 27, 1987, about the advertisements in the Asbury Park Press. The ads were published more than a year after the O'Neill v. Critchley verdict had been set aside.

At the CAA hearing, respondent testified that the jury verdict was "way beyond" what he could have reasonably foreseen and that "you never know what a jury is going to [do]." T22.[2] Asked what he believed the case to be worth, once the verdict was set aside, respondent replied that he had asked the judge to remit the case to the limit of the insurance policy, $500,000. The court denied respondent's request, however.

Respondent testified that he went ahead with the advertisements after studying the CAA opinions. According to respondent, he believed that, if the CAA had found problems with the proposed ads, it would have issued a cease and desist order, as it had done in other cases. Respondent claimed that, even after he received a copy of the grievance, he did not realize that the CAA had a "real problem" with the ad because there was no indication that it would be issuing a cease and desist order. In defense of the ad, respondent distinguished a jury verdict from a settlement, as discussed in Opinion 9, 128 N.J.L.J. 9 (1991), claiming that, unlike settlements, a verdict was the voice of a jury and a matter of public record. Respondent stated that he had been careful not to use the term "recovery" because he believed that "semantics were important."

Respondent testified that the ad intended to convey the idea that his firm aggressively litigated cases and was successful in obtaining verdicts. Respondent admitted that, in retrospect, he should have put a footnote in the ad, indicating the $7,000,000 was not the actual amount recovered.

---

[2] T denotes the transcript of the December 20, 1999 CAA hearing.

The CAA found that the advertisements stating that respondent had obtained a $7,000,000 verdict, even though literally true, was "potentially, if not actually" misleading to the consumer. The CAA noted that the advertisement did not disclose that the verdict had been set aside for being so grossly disproportionate to the injuries sustained by the plaintiff. The CAA concluded that that omission was a fact necessary to make the statement considered as a whole not materially misleading. RPC 7.1(a)(1). In reaching this conclusion, the CAA relied on Opinion 9, 128 N.J.L.J. 9 (1991). There, the CAA considered an attorney's advertisement that claimed that his client had been awarded $10.6 million. In fact, there was no "award" of damages because the case was settled. The defendants had agreed to purchase a $1.7 million annuity that, over time, would pay the client a total of at least $10.6 million. The CAA determined that the attorney's failure to disclose the existence and nature of a structured settlement in an advertisement about the attorney's past performance constituted an omission of facts necessary to make the statement as a whole not materially misleading.

Here, the CAA reasoned that respondent's failure to disclose that the jury verdict had been set aside was indistinguishable from the failure, seen in Opinion 9, to disclose the existence and nature of the structured settlement. The CAA also found that publishing the verdict, without more, created an unjustified expectation about the results respondent could achieve, in violation of RPC 7.1(a)(2).

The CAA found additional misleading statements in the advertisements. For example, the Asbury Park Press advertisement included the statements "OVER FIFTY YEARS OF TRIAL EXPERIENCE," "SCHIBELL & MENNIE, L.L.C., A TEAM OF AGGRESSIVE LITIGATORS" and photographs of only respondent and his partner. The CAA noted that respondent and the partner's combined years of practice totaled only forty-one years. The CAA concluded that, because the advertisement did not refer to the existence of any other lawyers in the firm or include their name or photographs, the statements were misleading. However, the CAA did not find that respondent intended to mislead the public. The CAA remarked that, if that had been the only misleading statement, it would not have recommended the imposition of discipline, but would have considered diversionary measures instead.

In mitigation, the CAA considered that respondent sought pre-publication approval for the two advertisements and made a good faith effort to comply with the rules by including a disclaimer in the ads.

A majority of the CAA recommended the imposition of a reprimand. One member would have dismissed the complaint, finding that respondent's conduct was not unethical. That member believed that the advertisements were not a disservice to the public because respondent merely used gross jury verdicts, rather than offers before trial, to show that he was an effective litigator.

* * *

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

Prior to publishing the ads, respondent attempted to obtain approval from the CAA. He submitted copies of the two proposed ads. In reply, the CAA informed respondent that the inquiry had to be submitted pursuant to R.1:19A-2 et seq. The CAA also cited two opinions for respondent's review: Opinion 15 and Opinion 9. As noted above, in Opinion 9, the CAA held that a failure to disclose the existence and nature of a structured settlement in an advertisement concerning past performance constituted an omission of facts necessary to make a statement considered as a whole not materially misleading, in violation of RPC 7.1(a)(1). Opinion 15, in turn, dealt with client testimonials. The opinion states that, traditionally, testimonials have been prohibited on the grounds that they create unjustified expectations about results the lawyers can achieve. In addition, claims regarding the quality of the lawyer's legal services cannot be measured or verified. The opinion states that a generic disclaimer can address these concerns. The opinion gives the following as an example of a disclaimer: "results may vary depending on your particular and legal circumstances." The disclaimer has to be prominently and effectively displayed in all print and television advertising.

Armed with this information, respondent inserted an identical disclaimer in his ads and proceeded to have them published in the Yellow Pages and the Asbury Park Press. The O'Neill v. Critchley case had not been concluded at the time of the publication of the ad. The court had set the verdict aside, finding it to be "grossly disproportionate to the injuries sustained by the plaintiff so as to shock the conscience of the court." The court added that the verdict was so grossly excessive "as to demonstrate such stated prejudice, partiality or passion [that] the verdict is not salvageable." Respondent should have known and, in fact, did know that the verdict was unreasonable, as was shown by his request for a remittitur to the policy limits of $500,000. The ads, thus, violated RPC 7.1(a)(1), in that they omitted a fact necessary to make the statement considered as a whole not materially misleading. Likewise, they could have created an unjustified expectation about the results respondent could achieve, in violation of RPC 7.1(a)(2). Lastly, the statement about the number of combined years of experience could be deemed misleading, as charged in the complaint.

Generally, making false or misleading communications either through misrepresentations of fact or by omitting facts necessary to make a communication as a whole not materially misleading will result in the imposition of a reprimand. See In re Caola, 117 N.J. 108 (1989) (attorney sent a targeted direct-mail solicitation letter misrepresenting the number of years he was in practice, his status in the law firm and the number and types of cases he handled); In re Anis, 126 N.J. 448 (1992) (reprimand where an attorney misrepresented that he was an experienced personal injury litigator and falsely

implied that other attorneys routinely charged a one-third contingent fee in certain matters, despite the graduated fee provisions of R.1:21-7); In re Garces, 163 N.J. 503 (2000), and In re Grabler, 163 N.J. 505(2000) (attorneys reprimanded for making false and misleading statements in a Yellow Page advertisement that included the designation certified civil and criminal trial attorney, when neither attorney was so certified; the ad also included the statement "largest recovery in the shortest time," in violation of RPC 7.1(a)(1) and RPC 7.1(a)(2) and (3)).

Here, we view respondent's conduct to be more serious than that expressed in CAA Opinion 9. The advertisement discussed in Opinion 9 was misleading because the case was settled. Thus, there was no "award" of damages. Nevertheless, the client, over time, would recover the amount stated in the ad because the attorneys had agreed to purchase an annuity that would pay at least the amount advertised in the ad. Here, at the time the ads were published, respondent knew that the $7 million award was excessive and that his client would receive only a fraction of that amount. In that respect, respondent's ad was more misleading to the public.

Based on the foregoing, we unanimously determined to impose a reprimand. One member did not participate.

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

Dated: 10/26/01

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John G. Mennie
Docket No. DRB 01-084

Argued: June 21, 2001

Decided: October 26, 2001

Disposition: Reprimand

Members	***Disbar***	***Suspension***	***Reprimand***	***Admonition***	***Dismiss***	***Disqualified***	***Did not participate***
Peterson			X				
Maudsley			X				
Boylan			X				
Brody			X				
Lolla			X				
O'Shaughnessy			X				
Pashman			X				
Schwartz							X
Wissinger			X				
Total:			8				1

Robyn M. Hill 12/10/01
Robyn M. Hill
Chief Counsel