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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-486 and 98-137

IN THE MATTER OF :
MARIA P. FORNARO, :
AN ATTORNEY AT LAW :

Decision

Argued: May 14, 1998

Decided: December 11, 1998

James D. Bride appeared on behalf of the District X Ethics Committee.

Stephen Weinstein appeared on behalf of respondent.

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

These matters were before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). In Docket No. DRB 97-486, the complaint charged respondent with violations of RPC 1.4(a) (failure to communicate with client) and RPC 8.1(b) (failure to respond to lawful demand for information from a disciplinary authority). In Docket No. DRB 98-137, the four-count complaint charged respondent with violations of RPC 1.1(a) (gross neglect) (count one); RPC 1.3 (lack of diligence) (count two);

RPC 1.4(a) (failure to communicate) (count three) and RPC 8.1(b) (failure to respond to lawful demand for information from a disciplinary authority) (count four).

Respondent was admitted to the New Jersey bar in 1989. At the relevant times she maintained an office in Morristown, New Jersey.

Respondent received a three-month suspension in 1997 for misconduct in four matters, including gross neglect, lack of diligence and failure to return property to a client in three of those matters, failure to communicate with client and failure to cooperate with a disciplinary authority in all four matters, failure to return an unearned fee in one matter, and false testimony and conduct involving dishonesty, fraud, deceit or misrepresentation in two of those matters. In re Fornaro, 152 N.J. 449 (1997).

DRB Docket No. 97-486 (The Purdue Matter)

Helen Purdue retained respondent in May 1992 to represent her in a custody matter. Purdue recalled paying respondent a retainer of $1,250 against respondent's fee of $175 per hour. Purdue was seeking to obtain the custody of her grandson who, through the Division of Youth and Family Services ("DYFS"), was living with foster parents. According to Purdue, her daughter, Helen Elfers, was incapable of caring for her son at the time because of personal problems.

Purdue testified that respondent met with her on a number of occasions, had telephone conversations with her and appeared in court several times in her behalf. Eventually, respondent succeeded in having Purdue obtain custody of her grandson.

Subsequently, in February 1994, Purdue retained respondent to represent her daughter in a paternity matter. The goal was to establish paternity in order to enable Elfers to obtain support payments from her child's father. Apparently, Purdue paid respondent a retainer in this matter as well.

Although the record is not clear, it suggests that there might have been a falling out between mother and daughter. On August 15, 1994 Purdue wrote to respondent confirming a conversation in mid-July 1994, in which Purdue told respondent that she was withdrawing her "monetary support in regard to the [Elfers v. McMahon] matter." Purdue requested that respondent forward to her an hourly accounting for the $1,250 she had paid in connection with the custody case. Although respondent received that letter, she failed to comply with Purdue's request. Almost a year later, July 12, 1995, Purdue again wrote to respondent referring to two earlier requests for an accounting: one made on August 15, 1994 and another on September 15, 1994. Purdue requested a written reply by July 28, 1995. The letter, sent by certified mail, was returned as unclaimed. Respondent had moved her law office. Thereafter, on August 16, 1995, Purdue sent another letter to respondent's new address and enclosed a copy of the July 12, 1995 letter. In the August 16 letter Purdue wrote the following:

> I know its [sic] been some time since my last request in your phone call telling me you were going to get this information to me, I am still waiting for the accounting of how the money was spent in regard to the above matter.
>
> I would really appreciate a response by the end of this month.

[Exhibit P-1C]

Again, although respondent received this letter, she ignored Purdue's request for an explanation of how the retainer had been spent.

After Purdue filed an ethics grievance against respondent, the DEC investigator also attempted to obtain an accounting from respondent. Although the investigator sent two letters to respondent, on January 19, 1996 and January 31, 1996, respondent failed to reply to the letters. It was not until February 26, 1997, the day of the DEC hearing, that respondent submitted her certification to the investigator, setting forth an accounting for the time spent in the matter and fees charged. Exhibit D-2.

Respondent, in turn, testified that she did not give Purdue an accounting because she believed there was a conflict of interest between Purdue and her daughter. Respondent stated that, at about that time, Purdue and Elfers were fighting and that Elfers had told respondent not to discuss the matter with her mother. Respondent, therefore, perceived a conflict in presenting Purdue with an accounting. Respondent also claimed that in March 1996 she received a letter from the Office of Attorney Ethics ("OAE") regarding a fee dispute in the matter and believed that she did not have to disclose the information or provide an accounting to the investigator.

Respondent had never explained to Purdue the reason why she had not complied with Purdue's requests. Respondent admitted, though, that she did have a duty to cooperate with the DEC investigator.

The DEC found clear and convincing evidence that respondent's conduct violated RPC 1.4(a) by failing to provide Purdue with the requested accounting about the retainer.

The DEC also found a violation of RPC 8.1(b) because respondent failed to provide the requested accounting until the day of the hearing. Based on these violations, the DEC recommended the imposition of a suspension.

DRB Docket No. 98-137 (The Rogg Matter)

In November 1993 respondent entered into an agreement with a Florida attorney, Joseph R. DeLucca, for respondent to represent his client, Cheryl Rogg, in New Jersey. Rogg, who had been a New Jersey resident, was involved in an automobile accident in December 1991, while in Florida. DeLucca represented Rogg in a personal injury action in Florida; respondent was to represent Rogg in New Jersey to recover PIP benefits from her New Jersey automobile insurer.

Respondent believed that the two-year statute of limitations was about to expire and that she had to file an action as soon as possible. It was not until much later that she learned that the statute of limitations in a PIP action is four years.

Based on information provided by DeLucca, respondent believed that Allstate Insurance Company ("Allstate") was Rogg's PIP insurance carrier. Respondent, therefore, filed a complaint against Allstate. According to respondent, DeLucca did not provide her with any "backup" documentation in the case. Although respondent filed the complaint against Allstate on December 8, 1993, it was not served by the Morris County Sheriff's Office until June 16, 1994. The record does not explain the cause of the delay.

On July 20, 1994 an Allstate representative wrote to respondent denying that it was Rogg's insurance carrier. Respondent admitted that she had not independently attempted to ascertain whether Allstate was in fact Rogg's carrier, relying instead on information given by DeLucca. The letter from Allstate informed respondent that Computer Science Corporation ("CSC") was Rogg's automobile insurance carrier. Respondent then contacted DeLucca to relay that information. According to respondent, DeLucca became upset and "yelled" at her when she told him that Allstate was not the carrier.

On January 17, 1995, thirteen months after respondent filed the initial complaint and six months after the Allstate letter, she filed an amended complaint adding CSC as a defendant. Respondent's explanation for the delay was unclear: she cited conversations between her and DeLucca about the Florida matter, and added that her other cases prevented her from filing the amended complaint earlier.

On February 16, 1995, the sheriff's office served the complaint on CSC. Respondent testified that, afterwards, she spoke with individuals from CSC, who told her that the company would not consider Rogg's PIP claim because it did not believe that Rogg was a New Jersey resident at the time of the accident. As a result, respondent attempted to obtain documentation from DeLucca proving that Rogg was a New Jersey resident. Respondent was unsuccessful. At some unspecified point respondent also received a notice from CSC indicating that it would not reimburse Rogg for her loss because her policy had been canceled

on January 8, 1992, six months before the date of the accident.[1] Because respondent was unable to make any progress with CSC toward a settlement, on April 5, 1995 she filed a certification and request for entry of default against CSC. Respondent blamed the delay in seeking a default on DeLucca's failure to give her relevant information.

Thereafter respondent filed a motion for the entry of a default judgment. Her motion was rejected for failure to include a form of judgment, an affidavit of non-military service, an affidavit or certification of proof of amount due and an affidavit or certification of an account of amounts due. Respondent apparently contacted DeLucca with regard to the deficiencies. On May 31, 1995 she sent him affidavits in support of the default judgment, to be executed by Rogg and returned for inclusion in an amended motion for entry of default judgment. It is unclear when respondent actually submitted the amended motion. However, on March 21, 1996 the court again notified respondent that her motion was defective, listed the deficiencies and directed her to submit a corrected motion for entry of default judgment by June 30, 1996.

In May 1996, DeLucca filed a grievance on behalf of Rogg. The DEC investigator wrote to respondent on May 6, 1996, seeking a reply to the grievance. After the filing of the grievance, respondent did not take any further action in the Rogg matter. Respondent testified that, once DeLucca filed the grievance, she believed that it would be a conflict of interest to continue to represent Rogg; she, therefore, did not attempt to cure the defect in the

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[1] The record does not establish why there is a discrepancy as to the date of the accident.

motion for entry of default judgment.

Respondent replied to the DEC investigator's inquiry by letter dated June 13, 1996. She indicated that the Rogg matter was the subject of pending litigation and that, when she made progress on the collection of the PIP benefits, she would contact the investigator. Although the investigator notified respondent that her reply was inadequate, respondent failed to submit anything further. Respondent testified, however, that she had some telephone conversations with the investigator. It is not clear when these conversations occurred or what was discussed.

Respondent applied to the assignment judge for counsel in the ethics matters. Respondent did not submit a copy of the application to the investigator, but only to the secretary of the DEC. On July 8, 1996 the assignment judge approved respondent's application for counsel and appointed Jane Ellen Doran to represent her in the disciplinary proceedings. Thereafter, Doran undertook respondent's representation in both the Purdue and the Rogg matters. A complaint in the Rogg matter was filed on July 26, 1996. With the assistance of Doran, respondent filed an answer to the Rogg complaint.

The complaint charged that respondent failed to communicate and to comply with DeLucca's reasonable requests for information. Respondent, the only witness at the DEC hearing, testified that she kept DeLucca apprised of the progress in the matter and submitted a number of documents and letters to him showing the action taken in Rogg's behalf.

The DEC found that there was evidence presented to show that respondent did pursue the Rogg matter, albeit "slowly." The DEC did not find clear and convincing evidence of

violations of RPC 1.1(a), RPC 1.3 or RPC 1.4(a). The DEC found, however, that respondent's failure to respond to the investigator's request for information was a violation of RPC 8.1(b). The DEC recommended the imposition of a suspension.

* * *

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

The Board, however, was unable to find that respondent's conduct was a violation of RPC 8.1(b). There is evidence that respondent communicated with the investigator in the Rogg matter by telephone and also submitted a reply, albeit inadequate. It is true that respondent's communications with the investigator were evasive. Nevertheless, she recognized that she needed to take some action in regard to the ethics grievances and applied for assigned counsel. The Board, therefore, did not find a violation of RPC 8.1(b).

It is undeniable, however, that respondent exhibited unethical conduct. In the Purdue matter, she failed to provide the accounting requested by her client. Her excuse – that there was a conflict of interest preventing her from supplying this information – does not ring sincere. Had respondent truly perceived a conflict in the matter, the proper course would have been to so advise her client. Yet, she continued to ignore Purdue's requests. Unquestionably, respondent's conduct in this regard was a violation of RPC 1.4(a).

As to the Rogg matter, the DEC properly found insufficient evidence to support findings of violations of RPC 1.1(a) or RPC 1.4(a). The DEC was correct in concluding that there was no clear and convincing evidence of gross neglect. Respondent filed the complaint within a reasonable time after being retained. She used the information provided to her by DeLucca to draft the complaint. The information proved to be erroneous. After learning that Allstate was the wrong insurer, respondent filed an amended complaint naming CSC as the insurer. Respondent also wrote and spoke to DeLucca on a number of occasions about the case. Thereafter, respondent took steps to obtain a default judgment against CSC, although those steps turned out to be deficient. In sum, respondent failed to finalize the Rogg matter, failed to independently investigate the information provided by DeLucca and failed to familiarize herself with the proper statutes and court rules dealing with the statute of limitations in PIP actions and the filing of default judgments. While this conduct was improper, it did not rise to the level of gross neglect. At most respondent's conduct in this regard was a violation of RPC 1.3 (lack of diligence).

There was no evidence presented on whether the Rogg matter was ultimately resolved or whether Rogg suffered any damage based on respondent's conduct.

The complaint also alleged, among other things, that respondent misled DeLucca about the status of the New Jersey matter, citing only a violation of RPC 1.1(a) rather than RPC 8.4(c). Other than DeLucca's statement in the grievance, however, there was no evidence presented to substantiate a misrepresentation. The letters from DeLucca were found to be inadmissable hearsay. Therefore, there is no clear and convincing evidence in the

record of a violation of RPC 8.4(c).

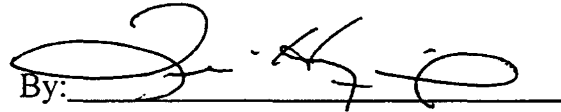
In short, respondent violated RPC 1.4(a) in the Purdue matter and RPC 1.3 in the Rogg matter. Had this been respondent's only brush with the disciplinary system, an admonition might have been sufficient discipline. See In the Matter of Cornelius W. Daniel, III, Docket No. DRB 96-394 (January 16, 1997) (admonition for failure to pay medical bills from personal injury settlement for four years and for failure to adequately communicate the status of matter to client); and In the Matter of Dennis Joy, Docket No. DRB 97-105 (January 6, 1997) (admonition for lack of diligence and failure to communicate). But see In re Bildner, 149 N.J. 393 (1997) (reprimand for lack of diligence and failure to communicate with client for two years after client's matter was dismissed with prejudice) and In re Brantley, 149 N.J. 21 (1997) (reprimand for lack of diligence in estate matter; the attorney, however, had significant history of discipline including two private reprimands, a one-year suspension and a three-month suspension).

Based on respondent's ethics history the Board unanimously determined that a reprimand was the appropriate measure of discipline for respondent's misconduct. One member did not participate.

The Board further determined that the conditions for reinstatement set forth in In re Fornaro, 152 N.J. 449 (1997) (a proctor for two years and the skills and methods core courses), should remain in effect.

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

Dated: 4/6/98



By:
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD VOTING RECORD

In the Matter of Maria P. Fornaro
Docket Nos. DRB 97-486 & 98-137

Argued: May 14, 1998

Decided: December 11, 1998

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling			x				
Zazzali			x				
Brody			x				
Cole			x				
Lolla			x				
Maudsley			x				
Peterson			x				
Schwartz			x				
Thompson							x
Total:			8				1

Robyn M. Hill 12/23/98
Robyn M. Hill
Chief Counsel