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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 94-263

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IN THE MATTER OF :  
BARRY F. ZOTKOW, :  
AN ATTORNEY AT LAW :  
\_\_\_\_\_

Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: September 21, 1994

Decided: March 10, 1995

Scott R. Lippert appeared on behalf of the District IIA Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District IIA Ethics Committee (DEC). The formal complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 3.2 (failure to expedite litigation) and RPC 3.4(a) (c) and (d) (concealing a document or other material with evidentiary value, knowingly disobeying an obligation under the rules of a tribunal and failing to make reasonably diligent efforts to comply with proper discovery requests by opposing party).

Respondent was admitted to the practice of law in New Jersey in 1971. He maintains an office in Fort Lee, Bergen County. By letter dated January 22, 1992, respondent was privately reprimanded for failure to oppose an adversary's motion to dismiss a complaint, failure to inform his clients that the complaint had been dismissed and failure to take remedial action until the filing of an ethics grievance, all in violation of RPC 1.1(a), RPC 1.3 and RPC 1.4(a).

In May 1989, respondent was retained by Limmer Commercial Refrigeration Co., Inc. ("Limmer"), Marie Limmer and her daughter, Marie Kober ("the clients" or "defendants"), the principal shareholders of Limmer, a family-held corporation. Limmer and the clients were the defendants in an action brought by the minority shareholders of Limmer, alleging corporate mismanagement, abuse of minority shareholders' rights and fraud. The clients filed a counterclaim and a third-party complaint alleging misappropriation of corporate funds.

Limmer and the clients were originally represented in the matter by the law firm of Kreiger, Karas, Kilstein, Kopf and Baime. Neil Kilstein, Esq., was Limmer's attorney and Seymour M. Karas, Esq., handled the litigation. After the answer was filed, the clients became dissatisfied with Karas' representation and asked respondent to represent them. (Kilstein remained involved in Limmer's corporate affairs.) Respondent had previously had an unspecified loose association with the Kreiger law firm and had represented the clients in an unrelated matter. Thereafter, the

clients retained respondent, in May 1989, paying him a \$5,000 retainer.

During the course of the litigation, respondent failed to answer a second amended complaint and failed to provide answers to interrogatories, despite the fact that the clients had previously given the answers to Karas. By court order dated June 25, 1989, respondent was given twenty days to provide answers to interrogatories. Respondent did not comply with the order. Accordingly, by order dated October 16, 1989, default was entered against the defendants. Thereafter, a proof hearing was scheduled, on February 8, 1990, to enter a default judgment against the defendants. Respondent was notified of the date of the hearing and that he would be allowed to cross-examine witnesses. By letter dated February 7, 1990 to the court, respondent requested a continuance of the hearing. In his letter, respondent indicated that he was prepared to serve the answers to interrogatories (C-1 Exhibit J). Significantly, the clients testified that they re-answered the interrogatories at respondent's request, in late 1989 or early 1990. The answers were not served until May 1990. Respondent testified that he had the answers when he wrote the February 7, 1990 letter to the court, but was awaiting the outcome of the proof hearing before serving them (2T 27-28).<sup>1</sup>

Respondent's request for an adjournment of the proof hearing was denied. Respondent failed to appear at the hearing, although

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<sup>1</sup> 2T refers to the transcript of the hearing before the DEC on December 16, 1993.

he admitted before the DEC that he had been aware that his attendance would affect his clients' interests. A default judgment was entered against the defendants on March 6, 1990. The court appointed a receiver to wind up the affairs of Limmer and to liquidate the corporate assets.

On May 1, 1990, respondent filed a motion to vacate the default judgment, contending that he had filed responsive answers to interrogatories. On May 21, 1990, he filed an amended motion, alleging that the stock purportedly owned by the predecessor-in-interest to the plaintiffs had been fraudulently issued in 1948. By order dated July 17, 1990, the court denied respondent's motion to vacate the default. Respondent's motion for reconsideration was also denied. On October 22, 1990, respondent filed a notice of appeal.

Respondent failed to tell his clients of the default, the proof hearing or the default judgment. According to the clients' testimony, they learned of the appointment of the receiver in late 1990. Respondent informed them that the appointment was a routine step always followed in a minority shareholder suit (C-2 at 26-27, C-3 at 74). Further, in October 1990, the clients learned of the default judgment through their accountant, who found out about it from counsel for the plaintiffs (C-4 at 5-7). The accountant testified before the court that, when he told one of the clients of the default judgment, her reaction was "[s]urprise and anger" (C-5 at 25). Contrarily, respondent testified before the DEC that he

had informed his clients of the default judgment prior to October 1990 (2T 35-36).

Thereafter, on November 26, 1990, Dennis Calo, Esq., was substituted as counsel for defendants to appeal the entry of the default judgment. On February 5, 1991, Calo filed a motion to remand to show that the defendants' neglect was excusable and that the defendants could present a meritorious defense. The appellate division denied the motion based on the inadequacy of the record. Consequently, Calo filed a brief and affidavits by the clients showing that respondent had neglected the case and had failed to communicate with them. The brief made further allegations regarding the plaintiffs' stock interests. The appellate division remanded the matter to the trial court for an evidentiary hearing and reconsideration of the denial of the defendants' motion to vacate the default judgment. The trial court was directed to determine whether the defendants could show prima facie evidence of a meritorious defense and, further, whether the defendants could demonstrate excusable neglect on their part. Specifically, the trial court was to determine whether respondent had neglected the case and, if so, to refer the matter to the OAE.

After several days of hearing between February 27, 1992 and April 13, 1992, the trial court determined that the defendants had presented sufficient evidence of a potential meritorious defense and that the defendants were without personal blame in the matter because respondent had failed to advise them of numerous significant events during the course of the earlier litigation.

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The DEC reviewed the transcripts of the hearings before the court as well as other relevant documents. Subsequent to this review, a hearing was held to enable the panel members to question respondent.

During the hearings before the court and the DEC, respondent argued that, when he obtained the file from the Kreiger law firm, he was instructed by Kilstein not to disclose to the plaintiffs the existence of a contract between Limmer and Greenway Development Co., Inc. ("Greenway") to purchase land owned by Limmer (C-5 at 88). The purchase price was \$6,500,000. (The price was originally \$9,500,000, but was reduced when Greenway learned that part of the property was undevelopable wetlands.) The contract was not to be revealed because the purchase price far exceeded the valuation of the property, as understood by the defendants. (The plaintiffs' complaint valued the property at over \$2,000,000. C-1 G.) Accordingly, respondent's litigation strategy was to "[d]elay, obfuscate and stonewall," which "would have the dual effect of concealing from plaintiffs the existence of the Greenway contract and at the same time induce the plaintiffs to come to the bargaining table and negotiate a settlement well within the parameters of our ability to settle" (C-5 at 91). Respondent intended to settle the case for \$225,000 and then sell the property to Greenway.

Respondent contended that, in order to avoid revealing the existence of the Greenway contract, he did not comply with discovery requests and, in particular, did not supply answers to interrogatories to his adversary (C-5 at 95). When asked by the panel why he could not have complied with discovery without disclosing the existence of the Greenway contract, which was not the subject of inquiries, respondent answered that he was better off not answering the interrogatories than providing answers that were "artful" (2T 115). Respondent further contended that "even without the Greenway contract Mr. Kilstein and the clients were perfectly happy to stonewall this litigation because of the personalities involved and the exposure involved" (2T 15). The clients, in turn, testified before the court that there was no plan to conceal the Greenway contract or to delay the litigation (C-4 at 62-63).

With regard to his failure to communicate with the clients, respondent admitted that he did not promptly inform them of developments in the litigation, but contended that they were aware of his strategy, which was discussed on a continuing basis (C-5 at 91-92). He maintained that the clients had given him "virtual carte blanche with which to manage the litigation and to explore the possibilities of settlement contemporaneously" (C-1 B at 4).

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The DEC determined that respondent had failed to apprise his clients of any of the adverse court rulings stemming from his

failure to comply with court orders and discovery requests. The DEC further found that, in addition to the above mentioned derelictions, respondent failed to appear at two pre-trial conferences, failed to comply with a notice to produce, failed to obtain an extension to file an appellate brief, despite representations to the contrary, and failed to file a pre-trial memorandum.

The DEC rejected respondent's defense in this matter based upon several factors aptly summarized in the hearing panel report.

The DEC concluded that respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4 (admitted in part by respondent, who stated that he advised his clients "of what was going on after it occurred" (2T 103)) and RPC 3.2, either because, as respondent testified, his plan was to delay or because he simply neglected the case. With regard to the alleged violations of RPC 3.4(a), the DEC determined to dismiss that charge on the basis that respondent had not actually attempted to conceal evidence; rather, that excuse had been fabricated after the fact to justify his behavior. The DEC also recommended the dismissal of the alleged violation of RPC 3.4(c), reasoning that the charged misconduct more properly fell under RPC 3.4(d). The DEC found a violation of the latter section, noting that respondent had failed to make reasonable efforts to comply with discovery requests.



CONCLUSION AND RECOMMENDATION

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

The DEC rejected respondent's testimony based upon the numerous factors and inconsistencies set forth in the record. Crucial to the DEC's conclusion was its assessment of witness credibility. No testimony was offered by the clients before the DEC. Indeed, the DEC relied on a cold record of the proceedings before Judge O'Halloran who, as the original fact-finder, deemed the clients' testimony to be more credible than respondent's. Like the DEC, the Board agrees with Judge O'Halloran's assessment. For example, respondent contended that his clients had been informed of the developments in this case, with the exception of the appointment of the receiver. During the proceeding before Judge O'Halloran, however, respondent's clients vehemently denied that they had been aware of the proceedings. Yet, respondent did not call his former clients as witnesses before the DEC and re-question them about their knowledge. Further examples are that respondent contended, (1) that Kilstein had advised him of how to proceed in this matter to delay the trial and that (2) respondent had no knowledge that the Greenway contract had been withdrawn because Kilstein had never so informed him. Yet, respondent did not call Kilstein to testify before the DEC. The logical conclusion is

that, as found by the DEC, respondent's inaction was the result of gross neglect, rather than litigation strategy.

Furthermore, a review of the transcript of the proof hearing (C-1 Exhibit K) reveals a statement by plaintiffs' counsel that respondent had telephoned him, on the day prior to the hearing, regarding an adjournment. According to plaintiffs' counsel, respondent stated that he would just as soon have the plaintiffs proceed with the hearing because he, respondent, could later move to have the judgment vacated and have the benefit of the transcript as a free deposition.

Even if it were assumed that respondent's testimony was truthful and that he believed that he could not comply with discovery requests without compromising his clients' position, his conduct was still improper. Although it is not unethical to employ "stonewalling" as a litigation technique, the clients' consent thereto is required. Based on the clients' testimony before Judge O'Halloran, consent was not obtained. They denied any knowledge of respondent's "strategy."

Moreover, the clients' testimony before Judge O'Halloran was that respondent had led them to believe that the matter was proceeding apace. At a certain point, however, that was no longer the case. Respondent failed to inform the clients of various proceedings and further failed to inform them of the entry of the default judgment. "In some situations, silence can be no less a misrepresentation than words." Crispin v. Volkswagenwerk, A.G. 96 N.J. 336, 347 (1984).

In view of the foregoing, the Board was convinced that respondent's testimony about Greenway was nothing more than a concocted excuse to cover up his gross neglect of the Limmer matter.

The Board unanimously recommends that respondent be suspended for a period of three months. See In re Smith, 101 N.J. 568 (1986) (three-month suspension for neglect in an estate matter, failure to communicate with a client and failure to cooperate with the DEC and Board). In addition, the Board recommends that, upon reinstatement, respondent be required to practice under the supervision of a proctor for a period of one year.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 3/10/95By: Raymond R. Trombadore  
Chair

Disciplinary Review Board