SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-012

IN THE MATTER OF	:
RICHARD FOLEY, JR.	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 9, 1994

Decided: May 20, 1994

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

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 on a recommendation for public discipline filed by the District III-B Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1974. On August 14, 1991, he was privately reprimanded for failure to communicate with his client and failure to notify the client of the dismissal of his suit. On January 22, 1991, respondent received a public reprimand for misconduct in three matters, including lack of diligence, gross neglect, misrepresentation about the status of the matter and failure to cooperate with the disciplinary authorities. By order dated September 22, 1992, respondent was suspended for two years, effective October 21, 1992, for ethics violations in three

matters, including gross neglect, lack of diligence, failure to communicate with clients, misrepresentation of the status of the matter, pattern of neglect, and failure to cooperate with the disciplinary system. While the matters that gave rise to this two-year suspension were pending before the Court, the Office of Attorney Ethics ("OAE") submitted directly to the Court a stipulation concerning five additional matters dealing essentially with the same misconduct exhibited in the matters then pending before the Court, namely, lack of diligence, failure to communicate, misrepresentation, and a pattern of neglect. The OAE recommended that a two-year suspension be imposed for respondent's unethical conduct in these five additional matters, the suspension to run concurrently with the two-year suspension imposed on September 22, 1992. By Order dated October 15, 1992, the Court adopted the OAE's recommendation.

* * *

The formal ethics complaint charged respondent with failure to file an Affidavit in Compliance with Administrative Guideline No. 23, requiring a suspended attorney to notify clients who had matters pending with him of his suspension (count one), and with gross neglect and misrepresentation to a client in a personal injury matter, both before and after the date of his suspension (count two).

In December 1985, respondent was retained by Eileen Laphan to represent her twelve-year old daughter, Jennifer, who had been injured in an accident. During the course of this representation, either Mrs. Laphan or Jennifer would periodically contact respondent to ascertain the status of the matter. On those occasions, respondent would invariably assure them that the case was proceeding apace. In fact, these representations were false, as respondent had not filed suit. On April 15, 1992, the statute of limitations expired, an event that went unnoticed by respondent. It was only during a subsequent conversation with Mrs. Laphan that, according to respondent, "a bell went off" about the running of the statute of limitations. As respondent acknowledged at the DEC hearing:

> I'm sure I went to the file at that point. I should have called her right back and I should have tried to correct this thing and I didn't **** and this was a time where I probably thought it was in suit, such an old case ****
> [T11/18/1993 19]

Once again, during that conversation, respondent misled Mrs. Laphan that the suit was proceeding in an orderly fashion.

After his suspension on October 22, 1992, Mrs. Laphan contacted respondent about a rumor that he had been disbarred. During that conversation, for the first time, respondent informed Mrs. Laphan that he had been suspended. Respondent did not seize that opportunity to confess to Mrs. Laphan that he had missed the statute of limitations. Instead, he continued to mislead her that the case was progressing normally.

Respondent did not deny the foregoing misconduct. As to the allegation that, during that conversation, he had given Mrs. Laphan the names of two fictitious attorneys who would be handling her daughter's matter, respondent testified as follows:

> I would like to think that I didn't make up some name and give it to her, but that I don't remember, but I remember my discussions over the years with Mrs. Laphan and generally the import of what she said was true except for I don't remember making a recommendation or I would like to think I didn't aggravate it more by giving a phony name.
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> [T11/18/1993 16]

With regard to the charge that he failed to comply with Guideline No. 23 and to file with the Court an affidavit in compliance with that guideline, respondent admitted that he did not notify his clients, in writing, of his suspension. He asserted, however, that "in each and every case" he had a personal meeting with the client to attempt to obtain representation by another attorney and to turn over the file to the client. He claimed that all of his clients had received their files, with the exception of Mrs. Laphan. He theorized that her name must not have been on the case roster that he was then reviewing on a weekly basis. Respondent explained that his failure to comply strictly with Guideline No. 23 was the result of procrastination and avoidance on his part, rather than willful indifference:

> In my mind I was complying and I was dealing with what had happened to me, what I had done to myself or however I put it. The same kind of inexcusable behavior, inexcusable because I was better than that that led to these various problems, that got me a two-year suspension

is the kind of thing that even contaminated the way I approached Guideline 23.

I don't want to read the order. I don't want to read Guideline 23. Frankly, it was almost like in October of 1992 everybody seemed to be amazed that I didn't go into some kind of shock and that I was still functioning and a couple people [sic] pointed it out to me, you're still functioning. Well, it came to me in slow motion. Somehow I was functioning. My wife was not handling this very well and I don't blame her. We're still married and that's kind of amazing. I guess that all the things, the procrastinations and the nonsense that over 17, 18 years of practicing law came to a head in the middle '80s and got me in all this mess were based on bad habits, a rotten administrator, a rotten businessman. I was always a good attorney when I did my job properly, but I was the world's worst businessman and I procrastinated and probably told myself this Laphan thing when this happened, I'll make them whole, this is terrible, she's a nice lady, it shouldn't have happened and [I] always had great intentions, but they weren't worth a damn.

I didn't deliberately, at least consciously, do this to myself, but the more I talk to people in the trade who knew me very well, including a lot of people whose opinion I respect, their general consensus along with perhaps that of the Supreme Court is that I wanted this to happen to me, that I actually set myself up that this would happen, and I don't want that to be true, but once again, I guess I should have sat down with a red pencil, highlighted 23.

I did read it. I remember reading it in December. I remember thinking about those restrictions on employment. In one of the prior presentments the phrase referred to me as arrogant and contemptuous and I thought that was out of line when I saw that, and then I found out where it came from. I didn't intend to be, but even now as I sit here today I was thinking about these things since I talked to [the presenter] last Tuesday in great detail and I'm saying I don't know, maybe there is something missing up here. Doesn't make a lot of sense. So that's it.

[T11/18/1993 29-31]

* * *

The DEC found that respondent had failed to comply with the Supreme Court order directing him to notify his clients of his suspension, that he had grossly neglected the handling of the Laphan matter and that he had made misrepresentations to his client that he had filed a complaint, knowing that to be untrue.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by the record.

Although the mere failure to file an affidavit in compliance with Guideline No. 23, without more, may at times not rise to the level of an ethics violation, here, respondent admittedly did not notify Mrs. Laphan of his suspension, either orally or in writing. He reasoned that the Laphan matter must not have been on the case list that he periodically reviewed for the purpose of complying with the guideline. It appears, however, that respondent's conduct in this regard was confined to the Laphan matter. Although it is undisputed that respondent did not comply strictly with the guideline — which required him to notify his client, in writing, of his suspension — respondent testified that, in all other instances, he personally met with his clients to return their files. It does not seem, thus, that respondent intentionally disregarded this aspect of Guideline No. 23. He advised all but one client — Mrs. Laphan — of his suspension, albeit not in

writing, as directed by the guideline. Nevertheless, respondent's inattention to the requirements of the guideline, including his failure to file an affidavit certifying compliance therewith, showed disrespect for the Court and the disciplinary system.

Respondent also admitted that he misrepresented the status of the Laphan matter on numerous occasions prior to his October 1992 suspension and that he did nothing to dispel Mrs. Laphan's belief that the case was proceeding apace, during a telephone conversation after his suspension. Respondent's misrepresentation, coupled with his gross neglect in handling the Laphan matter, violated RPC 8.4(c) and RPC 1.1(a).

At the Board hearing, asked about the appropriate form of discipline for this respondent, the presenter replied as follows:

> Well, at this stage, our only recommendation can be to -- it's pretty clear that if Mr. Foley returns to practice law in a private practice setting that this is going to occur again. And our only recommendation would be disbarment.
>
> Unfortunately, maybe in a case like this if, as he says, if it were a setting where he were practicing where he had no involvement with administering a business, maybe the result would be different. But there's no way that that can be controlled.
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> If, for example, he were involved in a situation like that, there is nothing to stop him for after a year or two years returning to a private practice setting. Under those circumstances, and because the misrepresentation that's not denied occurred right in the midst of when you would think that the seriousness of this conduct should have been brought home to him, he made a further misrepresentation.
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> And I point out that this error with the Lapin [sic] file occurred, he had the file during his previous

proctorship. So, for all of those reasons, there's just nothing else that can be recommended by our office except disbarment in this case.

[T3/9/1994 11]

Respondent, on the other hand, urged the Board to recommend to the Court that, if a suspension is to be imposed, it be made concurrent with the present two-year suspension, which is to expire in October 1994. Respondent alluded to his successful representation of clients for eighteen years prior to his peck of disciplinary troubles and his competence as an attorney. He blamed his administrative ineptitude for his ethics difficulties. He admitted his wrongdoing and apologized for his conduct. Lastly, respondent vowed that, if given the opportunity to re-enter the practice of law, the circumstances that led to his ethics problems will not reoccur because he has no intention of being a private practitioner.

After a consideration of the relevant factors, the Board was not persuaded that respondent should be disbarred. To be sure, the Board was troubled by respondent's prior private reprimand, public reprimand and two-year suspension, which were predicated on multiple instances of gross neglect, lack of diligence, failure to communicate with his clients, failure to cooperate with the disciplinary authorities and misrepresentation of the status of matters. Nevertheless, the Board was not convinced that respondent is beyond redemption. The Board was guided in its determination by the Court's forbearance from disbarring attorneys who, like this

respondent, committed a long series of violations. Viewed in isolation, those attorneys' unethical acts were not so serious as to merit the ultimate sanction of disbarment. They resulted, however, in strong discipline because they were so numerous. See In re Kasdan, 132 N.J. 99 (1993) (three-year suspension for (1) failure to comply with Guideline No. 23 by not deliberately notifying her clients, opposing counsel and the court of her suspension in order to continue to represent her clients in two matters and for (2) willful violation of Supreme Court order denying application for stay of three-month suspension to argue custody motion) and In re Kasdan, 115 N.J. 472 (1989) (three-month suspension for improprieties in six separate cases, including numerous instances of misrepresentations to clients, persistent failure to communicate with them, failure to collect sufficient funds at a closing, issuance of a trust account check against uncollected funds, fabrication of trial date, and preparation of false pleading with the intent to deceive her client that litigation was pending); In re Beltre, 130 N.J. 437 (1992) (three-year suspension for attorney's failure to cooperate with the district ethics committee, failure to escrow $3,000 to pay off a lien, misrepresenting to the Disciplinary Review Board that he had a bona fide office and for practicing law during suspension) and In re Beltre, 119 N.J. 190 (1990) (three-month suspension for failure to prosecute appeal, failure to cooperate with district ethics committee, failure to maintain a bona fide office, failure to

maintain trust and business account records, and practice of law while on the ineligible list for failure to pay the annual assessment to the Client Protection Fund); In re Martin, 132 N.J. 261 (1993) (public reprimand for misconduct in four matters including lack of diligence, gross neglect, failure to communicate, pattern of neglect and misrepresentation), In re Martin, 122 N.J. 198 (1991) (three-month suspension for unethical conduct in four matters, by failing to return to a client the unearned portion of the retainer after the clients' case had been dismissed, failing to pursue an appeal, failing to adequately communicate with clients in three of the four matters and failing to comply with the committee's request for information) and In re Martin, 118 N.J. 239 (1990) (six-month suspension for grossly neglecting seven matters, negotiating settlements without the clients' authorization in two of those matters, and displaying a pistol to two clients during a heated discussion, thereby frightening the clients; attorney's conduct in those seven matters spanned a five-year period from 1980 through 1985). But see In re Cohen, 120 N.J. 304 (1990) (attorney was disbarred for a pattern of neglect, failure to communicate, egregious failure to cooperate with the ethics system, failure to comply with Guideline No. 23 by not informing clients of suspension, alteration of filing date on complaint filed after the running of the statute of limitations and misrepresentation to client that complaint had been filed, which included giving client a false docket number; the attorney had been previously suspended

for one year for serious misconduct in five matters, In re Cohen, 114 N.J. 51 (1989), and also privately reprimanded in 1979); and In re Costanzo, 128 N.J. 108 1992 (attorney was disbarred for a pattern of neglect and abandonment of ten clients, and for practicing law while suspended. The attorney had been previously privately and publicly reprimanded).

A review of the above cases dealing with recidivist attorneys shows that disbarment was ordered only where the repeated conduct was so egregious that the Court was convinced that those attorneys were unsalvageable. Here, all of respondent's misrepresentations to Mrs. Laphan, with one exception, took place before his suspension and most likely were part and parcel of the same misconduct for which he was previously disciplined. What aggravated his last act of misrepresentation to Mrs. Laphan was that it was made at a time when the Court had already ordered his suspension and when he should have finally admitted to her all of his past lies. Nevertheless — and without minimizing the seriousness of his unethical act — it was not a "new" lie; it was the perpetuation of an old lie. Arguably, respondent might have been embarrassed to confess, after so many years, that he had not filed suit in behalf of Mrs. Laphan's daughter. Although this reasoning certainly does not excuse respondent's conduct, it may serve to explain it.

In sum, although this respondent has caused a lot of grief to his clients and although his ethics record is extensive, he does

not appear to be venal and beyond the pale. Accordingly, the Board unanimously recommends that respondent receive a two-year suspension, to run consecutively to the current two-year suspension that will expire in October 1994. The Board further recommends that, prior to reinstatement, respondent produce proof of fitness to practice law by way of a report from an OAE-approved psychiatrist, that he retake the ICLE Skills and Methods core courses and that he be supervised by a proctor for a period of two years. One member did not participate.

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

Dated: 5/20/94

By: Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board