SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-306

IN THE MATTER OF :
LAWRENCE S. GROSSMAN, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 16, 1994

Decided: March 10, 1995

Noel S. Tonneman appeared on behalf of the District IX Ethics Committee.

Michael J. Pappa appeared on behalf of respondent.

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 IX Ethics Committee (DEC). The complaint charged respondent with a violation of RPC 1.1(a) (gross neglect), RPC 1.2(a) (failure to abide by a client's decisions concerning the representation), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 4.1 (truthfulness in statements to others), RPC 8.4(a) (misconduct) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1965. He maintains an office in Morganville, Monmouth County. Respondent was privately reprimanded, by letter dated May 4, 1981, for practicing law in New Jersey under law firm names containing the

name of a lawyer who was not a member of the New Jersey bar.

The facts are as follows:

James H. Zeveney, Sr. ("grievant") was the driver of a vehicle that was involved in a one-car accident on September 22, 1979. The car slid off a wet road and struck a tree. Grievant claimed that he lost control of the car because of bald tires and that his employer, Drakes Bakeries ("Drakes"), was responsible for the maintenance of the company-owned vehicle. Grievant's son, James H. Zeveney, Jr. (James), who was then fifteen years old, was a passenger in the car. Both suffered personal injuries.

In or about early October 1979, grievant met with respondent regarding the accident. James met with respondent shortly thereafter. According to the testimony of grievant and James, respondent undertook to represent both of them in a lawsuit against Drakes. There was no retainer agreement. Respondent did not explain to them the conflict of interest between driver and passenger or James' right to sue his father. James, however, understood that, as the passenger in the vehicle, his claim was easier to pursue.

Respondent met with both grievant and James on two or three occasions within two or three months of their initial meeting. After that time, respondent advised grievant that he had the necessary information and that it was no longer necessary to bring James to the meetings. Grievant, thereafter, kept James updated on the status of his case. Both grievant and James believed that respondent was pursuing their claims and that the case was

proceeding apace.

In contrast to the testimony of the Zeveneys, respondent testified that he did not undertake the representation of James. Respondent explained that he had met with James merely to obtain his version of the facts of the accident and that, at the time of their meeting, it did not appear to him that James had been injured in the accident. Respondent also explained that, had he believed that there was a basis for a lawsuit, he would have undertaken the representation of the passenger, James, which would have been a far better claim to pursue. In addition, respondent contended that he told James that he could have sued his father, if James had been injured.

With regard to grievant's case, respondent testified that, although there was no signed retainer agreement, the fee arrangement had been explained to grievant. He further testified that, early in the representation, he informed grievant that there were serious difficulties in his case against Drakes. Indeed, the record contains correspondence from respondent to grievant voicing concern over the merits of the case and forwarding correspondence from Drakes on that issue.

Given respondent's concerns over grievant's ability to prevail on a negligence theory against Drakes, he determined not to proceed on that basis. In fact, on September 21, 1981, the statute of limitations for a personal injury action on behalf of grievant expired. On November 9, 1983, the statute expired on James' claim. Respondent had not filed a personal injury complaint on either

party's behalf by the applicable times. Further, respondent had never advised them as to the statute of limitations. At some point in the mid-1980s, grievant was told by a third-party that the statute of limitations on his claim had run and he asked respondent if that was so. Respondent assured grievant that he had another approach to the case and told him not to be concerned.

On October 4, 1984, respondent filed a complaint against Drakes on grievant's behalf. Respondent did not file a complaint on James' behalf. Although the complaint was for personal injuries, it asserted a cause of action based on a breach of contract, which has a longer statute of limitations, and a second cause of action for wrongful discharge of employment. Respondent testified that he foresaw great difficulty in proving negligence on the part of Drakes, pointing to the fact that it was a one-car accident and that subsequent inspection of the tires revealed that they were in good working order. Respondent was also concerned with comparative negligence on the part of grievant, who might have been driving the vehicle while aware of a problem with the tires. Respondent asserted that he used the breach of contract cause of action to remove the issue of negligence from the case. The record reveals that communication received from Drakes also caused concern over grievant's claim of wrongful discharge.

Grievant was deposed on November 6, 1985 and he also provided answers to interrogatories. Of significance is grievant's notation at the bottom of the interrogatories stating, "I want stipulated that my son, James H. Zeveney Jr, was involved in the above matter

and also was injured (bills attached). This is not a single person involvement." (original emphasis) (Exhibit P-5). Respondent testified that he told grievant that the suit had been filed only on his behalf. Grievant, however, claimed that respondent led him to believe that James was being kept in their "back pocket" for later use as leverage against Drakes (T6/2/94 93). Trial was set for September 1986.

Respondent's communication with counsel for Drakes continued to reveal that there were problems with the suit. Of particular concern to respondent was a medical report stating that grievant had suffered from episodes of momentary loss of consciousness. Drakes offered to settle the case for $1,000. Respondent, thereafter, contacted grievant by letter dated June 9, 1986, and asked him to meet with him to discuss the case. The parties' testimony as to what ensued differed greatly. According to grievant, respondent told him that they could obtain more money if they held out and then used James as leverage; grievant, therefore, refused to accept the $1,000 offer. According to respondent, however, he told grievant that they would lose at trial and grievant instructed respondent to settle the case for the largest sum possible. Thereafter, in August 1986, respondent settled the case for $1,000. Grievant testified that he had no knowledge of the settlement.

On August 28, 1986, Cynthia H. Augustine, Esq., one of the attorneys for Drakes, forwarded the release and stipulation of dismissal to respondent. Her letter also indicated that she was

notifying the court that the case had been settled. By letter dated December 22, 1986, Gregory C. Parliman, Esq., another attorney for Drakes, wrote to respondent and asked him to forward the release and stipulation of dismissal. Respondent did not forward the requested documents. By letter dated January 5, 1987, Mr. Parliman again requested the release and stipulation. Again, respondent did not comply with the request. According to respondent, although he did not reply in writing to counsel for Drakes, he spoke with them on the telephone. (The record is not specific as to the extent of the communication.) At that time and until 1991, when he consulted with another attorney, grievant believed that his case against Drakes was still pending.

In 1982, during the course of respondent's representation of grievant and prior to the running of the statute of limitations on James' claim, respondent undertook James' representation in connection with an unrelated worker's compensation matter. According to respondent's testimony, it was at that time that he learned that James had been injured in the 1979 accident. James asked respondent if the worker's compensation matter would affect his personal injury claim from the 1979 accident. Respondent assured him that there would be no ill effect. James continued to believe that his case was proceeding apace. By letter dated April 29, 1982 to Bayshore Community Hospital, respondent requested James' medical report in connection with the 1979 accident. That letter states "this office represents James Zeveney, Jr. for injuries he sustained in an accident on September 22, 1979"

(Exhibit P-1). Respondent stated that that was a form letter and that it had been erroneously mailed. He contended that he told James that he could not represent him in a claim arising from the earlier accident. Although the record is not specific, James received a recovery in the worker's compensation case. After mid-1982, he had no further contact with respondent.

With regard to communication, grievant testified that, early in the representation, he was able to speak with respondent, who replied to his messages. Subsequently, however, it became increasingly difficult to communicate with respondent. Grievant testified that, between the summer of 1986 and late 1988 or early 1989, he had no contact with respondent, other than on one occasion when respondent spoke with him, counseled him to be patient and added that if, grievant did not stop calling him, respondent would charge him for the calls. Respondent, in contrast to grievant's testimony, stated that he and grievant had spoken in that time period. He further stated that there was little written communication between him and his client because they spoke on the telephone so frequently.

By letter dated December 8, 1988, grievant inquired of respondent as to the status of the case and asked for his file. Respondent replied by letter dated December 16, 1988, in which he reminded grievant of the earlier settlement offer and pointed out the difficulties in the case. The letter did not state that the case had been settled but, rather, gave the impression that it was still pending. In fact, the letter suggested that grievant meet

with respondent, have lunch and discuss the case. On December 19, 1988, grievant again wrote to respondent, this time stating that he would seek other counsel and asking for a copy of his file. In January 1989, respondent provided grievant with a copy of his file. Grievant testified that he did not contact respondent after he received the file because he was "too hurt" (T6/2/94 112). As noted above, grievant subsequently consulted with another attorney and, in June 1991, learned that his case had been settled in 1986 and that the statute of limitations had run on his son's claim.

Subsequently, on July 28, 1991, grievant wrote to respondent regarding the matter. Grievant stated that his letter set out what had transpired and that he was hurt by the events. His letter further requested respondent to forward the release from Drakes. Respondent replied by letter dated September 5, 1991 and forwarded the release from Drakes, settling the case for $1,000. Grievant agreed to sign the release because his new attorney had advised him that the case was completed. Grievant signed the release on September 12, 1991.

Respondent's testimony with regard to the settlement differed vastly from grievant's. According to respondent, he informed grievant that he had settled the case; the latter was unhappy with the settlement. Respondent also explained that grievant's wife died in that time period and it was difficult to communicate with him. Respondent explained that, therefore, he did not forward the release to grievant for signature. After some time, the file apparently slipped through the cracks and respondent forgot about

it until he received grievant's letter of 1988. Seemingly, when respondent attempted thereafter to obtain the settlement funds from Drakes, he was informed that, when the release was not forthcoming, counsel for Drakes had sent the funds back to Drakes. In 1993, respondent filed a motion to enforce the settlement with Drakes. Grievant understood that there was a court proceeding going on at that time to obtain the money from Drakes. Grievant obtained the $1,000 in January 1994.

* * *

During the course of the investigation in this matter, respondent wrote to the DEC investigator/presenter on June 2, 1993:

> In June of 1986, we wrote the attached letter, Exhibit 'G', to Mr. Zeveney again talking about settlement. Meanwhile we received a first trial date in Monmouth County for September of 1986 and attempted to get in touch with Mr. Zeveney but were unsuccessful and the trial date was adjourned.
>
> We continued negotiations with Mr. Parliman and on December 16, 1988 we wrote the attached letter, Exhibit 'H' to Mr. Zeveney. At that time, we spoke to Mr. Zeveney and told him that he had to take the amount that wa [sic] offered because of the fact that, pursuant to the proofs in this case (1) his injuries were not related to the automobile accident because the proofs indicated 100% that he had reported these problems previously; and (2) there were pictures of the tires from the automobile which clearly showed the tires did not cause the accident in question. It was at this time that Mr. Zeveney indicated to us that we should get as much a [sic] we possibly could and, on that basis, we settled the case. Mr. Zeveney finally signed the Release in 1991, as indicated by the copy attached hereto as Exhibit 'I'.
>
> [Exhibit P-15]

In a letter dated June 10, 1993 to the DEC investigator/presenter, respondent stated:

> please be advised that, during the period from December 16, 1988 through September of 1991, we spoke to Mr.

> Zeveney on several occasions about the problems with this case and how it would be an impossible case to win, if it had to be tried. Mr. Zeveney indicated to me, in our last conversation around January of 1989, that I should try to get as much as I possibly could and get this case settled. I continued to discuss this case with Mr. Parliman but was unable to get him to move from the offer of $1,000.00, which I had relayed to Mr. Zeveney. [Exhibit P-4]

Respondent was asked why his letters reflected continuing negotiations after the time that the case was settled. Respondent contended that his language should have indicated continuing discussions, rather than negotiations, with Mr. Parliman about obtaining the $1,000 after the money had been withdrawn by Drakes.

The DEC determined that respondent violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(a) and (b), RPC 1.7(a), RPC 8.4(a) and (c) and R.1:21-7(g) (failure to have a written contingent fee agreement). The DEC did not find a violation of RPC 4.1, based on lack of evidence of misrepresentations to third parties.

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 found that respondent had violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(a) and (b), RPC 1.7(a), RPC 8.4(a) and (c) and R.1:21-7(g). This record contained a great deal of contradictory testimony that necessitated an assessment of credibility and weight of the evidence. The Board agreed with the assessment of the DEC.

If this record did not present clear and convincing evidence of gross neglect prior to settlement of the case in August 1986, then certainly it so demonstrated after that time. By respondent's own admission the file was set aside, the case slipped through the cracks and he did not obtain grievant's funds for him. Because of respondent's inaction, grievant obtained $1,000 in 1994 for an accident that had taken place in 1979, over fourteen years earlier.

In addition, the conclusion that respondent agreed to undertake James' representation seems inescapable. By not taking any action in James' behalf, respondent also displayed gross neglect.

With regard to the acceptance of the settlement offer, the record shows that the underlying case would have been difficult for grievant to win. Respondent knew that. It is possible that he accepted the offer knowing of grievant's reluctance, but cognizant that he would not do any better if the case went ahead. In either event, respondent went against his client's specific wishes and instructions. Again, the Board agrees with the DEC's view of the testimony and finds a violation of RPC 1.2.

Despite respondent's protestations to the contrary, he failed to sufficiently communicate with his client, in violation of RPC 1.4. Setting aside for one moment the issue of whether respondent intentionally misled grievant as to the proceedings in this case, it is clear that grievant had no idea what the status of his claim was. Indeed, he thought his case was pending with the court long after it had already been settled.

A key issue in this matter was the conflict of interest between grievant and his son, the passenger in the car. According to respondent, there was no conflict of interest in this matter because (1) he did not undertake the representation and (2) James was not injured and there was no cause of action. With regard to the first issue, the problem with respondent's testimony is twofold. First, respondent sent a letter on James' behalf with respect to the 1982 worker's compensation case, stating that his office represented him in connection with a 1979 accident. Respondent explained that the letter was a form that had been sent in error. Perhaps that was the case. More incriminating on that point, however, was the testimony of both Zeveneys that they firmly believed that respondent was representing James in connection with the accident. According to grievant, respondent told him that his son's name was not appearing in any documents because he was being "held in their back pocket," as a trump card of sorts. It appears unlikely that grievant would have developed that notion on his own, if respondent had not conveyed it to grievant. And even if respondent was not representing James, then he certainly did not adequately convey that information to his client.

Respondent's second argument was that he believed that James had not been injured in the accident. The problem with that argument, however, is the letter requesting the hospital records in James' worker's compensation matter. Even if, as respondent claimed, that was the first time that he learned of an injury, the statute of limitations still had not expired. Respondent should

have advised James at that time of his potential claim against grievant and against Drakes and should have suggested that he consult with another attorney. It is clear from James' testimony that that was not the case. Given these factors, it is unquestionable that respondent violated RPC 1.7(a).

The DEC determined that respondent violated RPC 8.4(c). Indeed, this case presents too many indicia of misrepresentation to find that there were merely misunderstandings in communication. The most damning evidence in this regard is the number of letters in the record with "poorly chosen" language indicating that negotiations were ongoing well after the case was settled. It is obvious that respondent mishandled this case and he knew it. He attempted to conceal that fact from his client and, subsequently, from the DEC investigator/presenter. Like the DEC, the Board finds that the conclusion that respondent violated RPC 8.4(c) is unavoidable.

It is respondent's misrepresentations that lend an air of credibility to the Zeveneys' version of the facts in this matter. At what point respondent's misconduct in this matter began is not clear, but, as one reads the record, it appears increasingly likely that respondent made an error, mishandled the case and then compounded his problems by misrepresenting the facts to his client and to the DEC in an attempt to cover up his mistakes. His actions in doing so make his testimony far less credible.

Respondent was guilty of a violation of RPC 1.1(a), RPC 1.2, RPC 1.3, RPC 1.4(a) and (b), RPC 1.7, RPC 8.4(a) and (c) and

R.1:21-7(g). Of significance in determining the appropriate quantum of discipline in this matter is the level of gross neglect of James' claim, the misrepresentations to grievant and the fact that respondent settled the case against the wishes of his client. In light of those factors, the Board unanimously recommends that respondent be suspended for a period of three months. See In re Moorman, 135 N.J. 1 (1994) (three-month suspension for gross neglect, lack of diligence and failure to communicate in a personal injury and small claims matter for one client) and In re Smith, 101 N.J. 568 (1986) (three-month suspension for neglect in an estate matter, failure to communicate with the client and failure to cooperate with the DEC and Board). Two members did not participate.

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

Dated: 3/10/95

By: Raymond R. Trombadore
Chair
Disciplinary Review Board