

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 94-262

\_\_\_\_\_ :  
IN THE MATTER OF :  
GARY LESSER, :  
AN ATTORNEY AT LAW :  
\_\_\_\_\_ :

Decision and Recommendation  
of the  
Disciplinary Review Board

Argued: September 21, 1994

Decided: December 7, 1994

Harry J. Riskin appeared on behalf of the District X Ethics Committee.

Respondent waived appearance for oral argument before the Board.

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 X Ethics Committee ("DEC"). The complaint charged respondent with violations of RPC 1.1(a) (gross negligence by not filing a brief on appeal), RPC 1.3 (lack of diligence by not filing and not trying to reinstate the appeal), RPC 1.4(a) (failure to communicate), and RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation). At the DEC hearing, the panel amended the complaint by charging a violation RPC 8.1(b) (failure to respond to lawful demand for information from a disciplinary authority), for respondent's failure to file an answer and to appear at the hearing held on April 26, 1994.

Respondent was admitted to the New Jersey bar in 1969 and maintained a solo practice in Budd Lake, New Jersey. He received a letter of private reprimand dated February 27, 1989 for lack of communication with his client about deducting his fee and costs from trust funds (DRB 89-012). He was temporarily suspended by Consent Order dated October 26, 1993 pending conclusion of an additional ethics matter. In yet another matter, the Board recommended a three-month suspension under DRB 93-287, argued October 20, 1993, for lack of diligence, failure to respond to client's request for information, conflict of interest, failure to keep clients funds separate, and failure to comply with recordkeeping provisions (dentist collection practice). The Court has not yet acted on that recommendation.

In late 1986 or early 1987, respondent was retained by Robert and Karen Allatin to file a lawsuit against a real estate agency and several individuals to recover money from a real estate transaction that failed in 1985 or 1986. The matter was pending for several years, during which time respondent handled depositions. On November 9, 1990, summary judgment was entered against the Allatins. On December 24, 1990, respondent filed a notice of appeal on behalf of the Allatins, who paid respondent \$300 towards the appeal. Notice of docketing of appeal was filed on March 20, 1991, with an order requiring the filing of a brief by April 8, 1991.

On April 26, 1994, the DEC held a formal hearing, which respondent did not attend. The sole witness who testified then was Mr. Allatin. The presenter stated that he had just tried to phone respondent at his office number; he was advised that the phone was temporarily disconnected and that there was no residential listing.

The DEC unanimously determined by clear and convincing evidence that respondent violated the four RPC sections, as alleged in the complaint. Moreover, respondent's failure to file an answer to the complaint, to reply to the DEC letters, and to appear at the DEC hearing were likewise determined unanimously to constitute violation of RPC 8.1(b) (failure to respond to a disciplinary authority). T20.

The DEC recommended public discipline.

#### CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's finding that respondent was guilty of unethical conduct is supported by clear and convincing evidence. An attorney's failure to file a timely brief on appeal resulting in the matter's dismissal is clearly a violation of RPC 1.1(a) (gross negligence) and RPC 1.3 (lack of diligence), warranting at least a private reprimand and, in certain circumstances, a public reprimand. In re Gaffney, 133 N.J. 65 (1993); In re Russell, 110 N.J. 329, 331 (1988). This dismissal is undisputed (Exhibit P-3, order dismissing appeal dated March 20, 1991).

Beginning in January 1991 and continuing through April 1993, Robert Allatin visited respondent's office weekly and inquired about the status of the appeal. T15, 17.<sup>1</sup> Respondent repeatedly told Mr. Allatin that he was waiting for a "date." T15.

In early spring of 1993, Karen Allatin called the Clerk of the Appellate Division and received a written reply advising that the appeal was dismissed on May 20, 1991, for failure to file a timely brief. Exhibit P-3 in evidence. Thereafter, in April 1993, Robert Allatin visited respondent at his office, inquired about the appeal status, and was told again by respondent that he was waiting for an appeal date. T14. Mr. Allatin showed the written dismissal to respondent, who looked at the paper and said "I screwed up." T14. The record is silent as to respondent's actual knowledge of the dismissal.

\* \* \*

The DEC found no indication that respondent communicated further with the Allatins on this matter, except for a letter dated August 6, 1993 from respondent to the DEC investigator, in reply to this grievance. Exhibit P-1 in evidence. An undated formal complaint was filed and forwarded to respondent by letter dated February 1, 1994.

Respondent did not file an answer or otherwise reply to correspondence from the DEC. T5,6.

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<sup>1</sup> T denotes the transcript of the DEC hearing on April 26, 1994.

The sole witness at the DEC hearing, Mr. Allatin, testified that he personally asked respondent weekly for two years, through April 1993, about the status of the appeal and that respondent repeatedly answered that he was waiting for "a date." Allatin further testified that, upon seeing the copy of the order of dismissal, respondent admitted "I screwed up." Respondent did not refute these allegations by answer, letter or testimony. In fact, respondent did nothing. The DEC apparently found Allatin credible and determined that respondent violated RPC 1.4(a) (failure to communicate) and RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation). Such conduct compounds the failure to file the brief timely. "Public confidence in the bar is diminished when an attorney represents to a client that the case is proceeding smoothly when it is not. Clients should not continue to suffer the consequences of being told that their case is under control, when it is not." In re Grabler 114 N.J. 1, 10-11 (1989) (four clients misled or lied to), citing In re Goldstein, 97 N.J. 545, 549 (1984) (clients were told claims were filed, advanced or settled and for the most part nothing was done).

There were no defenses raised, no hint of health problems, and not a scintilla of contrition in this matter. Further, respondent's prior discipline (letter of reprimand in 1989) may be considered an aggravating factor.

The proof of misrepresentation rests upon the testimony of the sole witness, Allatin. The presenter has the burden of proof in disciplinary proceedings. In re Feltman, 51 N.J. 27, 29 (1968).

When the Court is satisfied with reasonable certainty that a prima facie case of disciplinary misconduct has been made out against an attorney, the burden of overcoming such prima facie case by evidence rests on the attorney, who must then prove proper performance of trust. In re Herr, 22 N.J. 276, 286-287 (1956). This respondent made no effort to overcome the proof offered by the presenter.

Respondent does not seem to have improved his conduct since the various ethics proceedings were instituted against him. In 1989, he received a private reprimand. In March 1992, a grievance was filed in DRB 93-287; the complaint for that matter was filed in February 1993. The alleged misrepresentations in this matter began in 1991 and continued through April 1993. Thus, there are no indicia of attempts to ameliorate his lack of diligence, client communication, candor, or contrition.

Finally, the DEC added and found a violation of RPC 8.1(b) (knowing failure to respond to a lawful demand for information from a disciplinary authority). The Board has demonstrated a willingness to condone an attorney's initial failure to cooperate if the attorney appears at the hearing and subsequently cooperates. This respondent failed to answer in any way to the formal complaint and letters and did not appear at the DEC hearing. Failure to answer a formal complaint constitutes disrespect to the Supreme Court and the ethics system. In re Skokos, 113 N.J. 389, 392 (1988). An attorney has an obligation to cooperate fully with an ethics committee. In re Gavel, 22 N.J. 248, 263 (1956).

Disrespect to an ethics committee constitutes disrespect to the Supreme Court. In re Grinchis, 75 N.J. 495, 496 (1978).

As noted earlier, respondent filed no answer and failed to appear at the DEC hearing. Accordingly, the allegations of the complaint must be deemed admitted.

Respondent violated RPC 1.1(a) when he did not file a brief on appeal. He violated RPC 1.3 by not trying to reinstate the appeal. His failure to advise the client about the status of the matter violated RPC 1.4(a). His conduct in misleading the client that the matter was pending, merely waiting for a date, violated RPC 8.4(c), whether his actions were intentional or reckless.

Clearly, the failure to cooperate with and respond to an ethics authority also constitute a violation of RPC 8.1(b). His cavalier attitude in a prior matter heard by the Board clearly carried through in his indifference to the disciplinary authorities in this matter.

Gross neglect, misrepresentation and failure to cooperate ordinarily merit public reprimand. See In re Mahoney, 120 N.J. 155 (1990); In re Cervantes, 118 N.J. 557 (1990); In re Williams, 115 N.J. 667 (1989). However, case involves repeated neglect; if it were the first matter before the Board for this respondent, a short suspension might be appropriate. However, this is the third matter before the Board in a five-year period.

After considering the totality of the circumstances, the Board concludes that this respondent did not learn from the prior matters and that the public should be protected further. The Board

unanimously recommends a one-year suspension, to run consecutively with the three-month suspension recommended by the Board on September 21, 1994 in a prior matter. In addition, the Board recommends a two-year proctorship, following his reinstatement.

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

Dated: \_\_\_\_\_

12/7/1994

By: \_\_\_\_\_



Raymond R. Trombadore  
Chair  
Disciplinary Review Board