Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-288

IN THE MATTER OF :
JOSEPH F. FLAYER, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 20, 1993

Decided: June 9, 1994

Harry J. Riskin appeared on behalf of the District X 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 X Ethics Committee (DEC). The complaint charged respondent with violation of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate), RPC 3.2 (failure to expedite litigation and failure to act with consideration toward those involved in the legal process) and RPC 4.1(a)(1) (false or grossly negligent statement to a third party). Respondent was also charged with failure to cooperate with the DEC, denoted as both a violation of RPC 8.4(a) and of the Rules of Professional Conduct generally. The complaint was later amended to include a charge of violation of RPC 8.1(b).

Respondent was admitted to the practice of law in New Jersey in 1976 and is engaged in private practice as a sole practitioner in Budd Lake, Morris County. Respondent was publicly reprimanded, by order dated July 13, 1992, for misconduct in a personal real estate matter. Specifically, respondent released escrow funds without the prior consent of the seller. Respondent also failed to cooperate with the disciplinary authorities.

On October 4, 1988, Frank Shillcock was injured as a result of an automobile accident. After Mr. Shillcock discussed his personal injury claim with respondent on December 20, 1988, he and his wife decided to retain respondent. By cover letter dated December 21, 1988, respondent mailed to the Shillcocks a contingent fee agreement form and a medical authorization form. That fee agreement form contained the following language: "The Law Firm will either require that you pay [litigation] expenses in advance or that you repay the Law Firm if they make these payments for you" (Exhibit C-3). According to Mr. Shillcock, during their first meeting, respondent advised him that expenses of the litigation would be paid at the end of the case (1T 94).[1] It was Mrs. Shillcock's testimony that, after receiving the form, she telephoned respondent regarding his fees and the need to advance costs, explaining that she and her husband were not in a financial position to do so (1T 84-85, 87). According to the Shillcocks, respondent assured them that his fees would be paid out of the

[1] 1T refers to the transcript of the hearing before the DEC on January 28, 1993.

settlement proceeds, that he would advance the costs and the Shillcocks could repay him when the case was completed (1T 24, 59). Respondent also advised them that the costs would be minimal because they had the records from Mr. Shillcock's worker's compensation case, which was being pursued by Ronald Bronstein, Esq. (1T 24, 93, 110). The Shillcocks signed and returned the retainer to respondent, who signed it on December 28, 1988 and sent a copy back to the Shillcocks. Respondent then forwarded an eight-page document to the Shillcocks, dated January 16, 1989, advising them of what to expect during the course of their lawsuit (1T 27, Exhibit C-5). The Shillcocks testified that they received no further correspondence addressed to them (1T 28-29), but only copies of correspondence that respondent had sent to other parties. However, there is also a "speed memo" by respondent to Mr. Shillcock, dated January 16, 1989, apparently received by him, regarding payment of medical bills (Exhibit J-1A). The record also contains numerous medical records and correspondence among respondent, Bronstein and other parties regarding the Shillcocks' claim (Exhibit J-1A). Mrs. Shillcock testified that she did not attempt to communicate with respondent after the January 16th letter because that letter stated that there would be long periods of time where there would be no contact between them (1T 29-30).

Respondent filed a complaint in behalf of the Shillcocks on October 2, 1990, two days before the statute of limitations would have run. Respondent failed to have the complaint served on the defendants. Thereafter, by order dated April 12, 1991 and entered

on April 16, 1991, the complaint was dismissed without prejudice for failure to prosecute. The order directed respondent to show cause, on April 12, 1991, why the matter should not be dismissed. Respondent failed to appear. Respondent testified that he received the dismissal notice and that he understood that, if the complaint were dismissed, his clients potentially faced a statute of limitations defense (2T 30). He later testified that, although he did not recall whether he had actually received notice that the court would dismiss the complaint, he was aware that the court would generally do so for failure to effect service (2T 58). Respondent received a copy of the order of dismissal, although the record is silent as to when (2T 58).

Respondent contended that he sent correspondence to the Shillcocks, dated August 30, 1990, October 3, 1990, February 5, 1991 and May 6, 1991 (Exhibits C-2 and J-1A). In his letters, respondent allegedly requested Mr. Shillcock's medical records as well as the reports of the worker's compensation matter filed in behalf of Mr. Shillcock and asked for funds to cover litigation costs, including $2,500 for doctors. In the May 6, 1991 memo, respondent stated that the court had dismissed the Shillcocks' complaint and enclosed a copy of the order. As noted above, the Shillcocks testified that respondent had initially told them that the records and medical reports from the worker's compensation case could be used in the personal injury matter and that, accordingly, there would be little or no expense involved to retain additional physicians to provide reports. Despite this, respondent's May 16,

1991 memo further stated that the case could be placed back on the trial list, but that first the Shillcocks had to provide him with monies for costs and doctors. In addition, respondent's memo stated "[c]all me if you don't understand this. If I don't hear from you, I will not do anything further. If you want another attorney to take over this file, have one contact me to arrange a transfer of this work" (Exhibit J-1A). The Shillcocks denied having received respondent's memos to them (1T 72, 106) and further denied having been advised that the complaint had either been filed or dismissed (1T 85, 97, 114).

Mrs. Shillcock testified about the difficulty in communicating with respondent, in that he would not reply to telephone messages or correspondence. Mrs. Shillcock further testified that she left telephone messages on December 20, 21, and 22, 1990, and received no response. She also sent correspondence on December 23, 1990, providing information on the worker's compensation case and requesting information on the personal injury matter. She left further messages after she received no reply to the December 23, 1990 letter. According to Mrs. Shillcock, respondent subsequently contacted her and explained that he had not received that letter and that the case was proceeding apace. He did not request funds at that time (1T 36). On January 29, 1991, Mrs. Shillcock resent the letter and attachments (1T 35, Exhibit C-8). There was no reply. Mrs. Shillcock sent further correspondence and information to respondent in April 1991 and December 1991.

Mr. Shillcock testified that most of his conversations with respondent took place after December 1990, when his worker's compensation matter was settled (1T 96). He stated that, on several occasions, he left between three and five telephone messages a week on respondent's answering machine, before respondent returned his calls. On those occasions, respondent would assure Mr. Shillcock that he was in communication with the insurance company and that he expected the case to settle within one month (1T 98).

In early Summer 1991, Mr. Shillcock went to respondent's office, at which time respondent took him to lunch. According to Mr. Shillcock, there was very little discussion of his case (1T 115), which respondent assured him was progressing (1T 99). According to Mr. Shillcock, there were no discussions regarding either the costs and disbursements or the dismissal of the complaint (1T 100). Respondent testified that they "didn't talk about the case at all" (2T 45).[2] In August 1991, Mr. Shillcock telephoned respondent regarding the status of the case. According to Mr. Shillcock's testimony, respondent instructed him to stop telephoning him and that, if he was not satisfied with his services, he should "find another f___ing lawyer" (1T 101). A few days later, respondent telephoned Mr. Shillcock and apologized, stating that the case would settle by the end of 1991. There was no discussion of fees and disbursements. At the time respondent

[2] 2T refers to the transcript of the hearing before the DEC on March 11, 1993.

and Mr. Shillcock had this conversation, the case had been dismissed for four months and no motion to restore the complaint had been filed.

In October 1991, respondent told Mr. Shillcock that the case would be settled by the end of the year. Again, there was no discussion of costs or the dismissal (1T 101-102). Mr. Shillcock had no further conversations with respondent (1T 102).

The Shillcocks sent a letter to respondent on January 24, 1992, via certified mail only (1T 48), advising him that they were dissatisfied with his services based upon, among other factors, his failure to answer their letters, to return their telephone calls and to keep them informed of the status of their case. They further advised respondent that they wanted their file sent to Frank Olivo, Esq., their new attorney. Respondent's file contains a copy of the Shillcocks' letter with the following language inserted at the bottom: "1/28/92 Dear Frank [Shillcock]: I am sorry you find my work inadequate. You did not do your end. I still don't have the $150.00 from you nor did you post the $2,500 for the doctors. Have your new attorneys send me a substitution of attorney to sign into them, gurantee [sic] my costs and lien on the file and I will arrange an orderly transfer of this matter for you" (Exhibit J-1A). Mrs. Shillcock testified that they never received a response to their letter (1T 53). Further, Mrs. Shillcock testified that respondent could not have received their January 24, 1992 certified letter because the letter had been returned to them, on February 28, 1992, as "unclaimed" (1T 42). The envelope

(Attachment to Exhibit C-10) bears notification dates to respondent of January 28, 1992, February 5, 1992 and February 13, 1992 (1T 42). On the advice of Olivo, Mrs. Shillcock resent the letter by regular mail, in early March 1992. The Shillcocks received no reply and had no further contact with respondent (1T 54). Respondent, however, claimed that he had received the letter on or about January 28, 1992 and that the Shillcocks must have sent it via regular mail as well. (1T 32, 50).

Olivo testified that they first consulted with him in late 1991. According to Olivo, Mr. Shillcock told him about his case and complained that he was unaware of its status and that "it just seemed like it was dragging on forever" (1T 118).

A series of letters and telephone messages was exchanged between Olivo and respondent, primarily involving Olivo's attempts to obtain the Shillcocks' file. Of particular interest was a "speed memo" Olivo received from respondent, dated May 14, 1992, acknowledging receipt of a message and letter from Olivo. Respondent's memo stated: "I am finishing up the motion to have the case restored to the calendar. I expect it to be filed next week. I will send you a copy. Service on the defendant is going out. After this has been fixed, I will contact you about a transfer of this file. I just have not been able to get to this any sooner. I appreciate your efforts to have this go smoothly" (Exhibit J-1A). By this time, the complaint had been dismissed for over one year.

With regard to respondent's decision to prepare the motion to

restore in the Shillcocks' behalf, the following exchange took place:

MR. RUTHER: I'm not asking you to repeat your case. I'm just trying to understand.

At another point in time you decided to move to restore the complaint?

[RESPONDENT]: Well, Mr. Olivo testified here that he thought it was a better idea that I move to restore this complaint as well here. I had thought about this and it would be better if I gave him a complete file without having a problem with it.

MR. RUTHER: But you hadn't received the payment at that point?

[RESPONDENT]: No.

MR. RUTHER: You were willing to do this because mister [sic] Olivo asked you to?

[RESPONDENT] I figured getting paid something from someone else doing this. May be it was a factor they were 130 miles away, they needed somebody local. Maybe Mr. Olivo was going to advance for the funds for this. I didn't really care. I don't find that it's satisfactory to do to advance funds for clients under the circumstances when they can afford to pay for it.

MR. SWEENEY: Mr. Flayer, excuse me. I think what Mr. Ruther is asking is though you took the position with the Shillcock's [sic] that you would do nothing until the funds were advanced, then you get a letter from Olivo and you agree and you begin to prepare a motion restore [sic] without receiving the funds. What's the difference between pursuing the matter for the Shillcocks or pursuing it because Olivo calls you?

[RESPONDENT]: Because I'm getting a response to the case. I didn't get any response to my bills.

MR. SWEENEY: The response being that --

[RESPONDENT]: Payment, or I haven't got it or I can give you $2.00. I mean I'm reasonable, but I didn't get any response to all these letters.

MR. SWEENEY: Did Olivo say he was going to pay you?

[RESPONDENT]: No, he didn't say that he was going to pay me until later. He knew he would have to.

MR. RUTHER: He didn't say until later he was going to pay you? When did he say he would pay you?

[RESPONDENT]: There's a letter here of December 22, 1992. There's a letter in the file of that date from Mr. Olivo where he says 'I will also reimburse at the time of execution of the substitution of attorney all documented disbursements made on behalf of the client pursuant to your retainer agreement, which I would appreciate seeing a copy of.' My response to that -- and he had supplied a substitution of attorney with that letter that he had prepared, so I knew he would take the case. I have had cases where attorneys take cases like this. They see how much work you've done on it, look and see if there's a future in it for them, and then send it back. I can't allow that to happen.

[2T 59-61].

It should be recalled that respondent had allegedly been working on the motion since at least May 1992, seven months before receiving Olivo's letter regarding compensation.

In June 1992, after respondent had taken no further action on their behalf, the Shillcocks filed their grievance with the DEC. On July 16, 1992, Brian M. Laddey, Esq., the DEC investigator, and later the presenter in this matter, wrote to respondent, forwarding the Shillcocks' grievance and requesting a response within two weeks. Respondent testified that, after he learned of the grievance against him, he took no further steps to reinstate the complaint. Respondent failed to inform Olivo or the Shillcocks of his determination that he would no longer pursue the motion to restore the case.

Olivo continued to send letters to respondent in an attempt to obtain the file. After one such letter, dated November 25, 1992, respondent replied by letter dated December 17, 1992, copied to the

DEC investigator, Laddey (Exhibit C-14). Respondent's letter stated, inter alia, that his communication with Olivo had been limited because the latter had encouraged the Shillcocks to file the ethics grievance. In addition, respondent demanded that Olivo provide a substitution of attorney and a guarantee to protect respondent's lien for services and costs. Respondent stated that he would not turn over the file unless those two conditions were met or a court order issued. Respondent further alleged, in that letter, that Olivo and the Shillcocks had known, since July 1992, that, on receipt of the ethics grievance, respondent had discontinued pursuit of the motion to have the case reinstated. Respondent also stated that Olivo could have filed the motion to restore and that Olivo had provided false information to the DEC.

Olivo replied to respondent by letter dated December 22, 1992. The letter stated that their last correspondence was the May 14, 1992 memo, advising that respondent was finishing the motion, would forward a copy to Olivo and would then contact Olivo's office about transferring the file. Olivo's letter stated that this had not been done and denied that respondent had told him that he was stopping work on the motion. Olivo again requested a copy of the retainer agreement. The letter enclosed a substitution of attorney and advised respondent that Olivo would enter into a consent order for respondent to apply to the court for compensation for fees, should there be a recovery. Olivo further advised respondent that, upon receipt of the executed substitution of attorney, he would reimburse respondent for all documented disbursements (Exhibit C-

17). According to Olivo, at no time between respondent's memo to him of May 14, 1992 and the letter of December 17, 1992, did respondent advise him that he no longer intended to file the motion to restore the case. Further, it was Olivo's testimony that he was unaware of any difficulties with costs and disbursements until he saw respondent's answer to the formal ethics complaint (1T 131, 134).

Respondent's file contains a "speed memo" dated January 22, 1993, forwarding the substitution of attorney to Olivo and asserting that his costs in this matter were $52 for hospital records, $75 filing fee for the complaint and $100 for postage, photocopying and telephone. The memo stated that he would be compiling his time records for work performed and that he expected at least one-third of the net counsel fee. Respondent's file contains another memo to Olivo, dated January 25, 1993, enclosing the correspondence and pleadings in the Shillcocks' matter and a copy of his retainer agreement, requested by Olivo on several prior occasions. By memo dated January 27, 1993, respondent forwarded the remainder of the Shillcocks' file to Olivo. Olivo testified that, as of the date of the first DEC hearing, January 28, 1993, the Shillcocks' complaint had not been reinstated and he had not received the Shillcocks' file from respondent (1T 139).

Respondent, in turn, testified that he had no recollection of a telephone conversation with Mrs. Shillcock regarding fees and costs. He stated that, according to his usual office practice, he

would not have agreed to advance the costs. He explained that he would have told them "pay as you can when you're billed" (2T 19).

Respondent testified that the Shillcocks failed to cooperate with him in his pursuit of this matter. According to respondent, one of the difficulties in this case was that the Shillcocks apparently did not receive certain communications from him. Respondent blamed the Shillcocks for failing to provide him with new addresses when they moved, despite the fact that his January 16, 1988 communication requested that they do so (2T 16). Although respondent stated that he did not hear from the Shillcocks for over one and one-half years, he then testified that, while there may have been some telephone calls between them, he was unable to proceed because the Shillcocks failed to forward necessary medical information to him (2T 17-18).

Respondent also testified that he stopped working on the file upon receipt of the grievance and that he contacted Chesson, the DEC Secretary, to advise him that the grievance did not correctly state what had occurred in the case. He further stated that he had received nothing from Olivo between the time of the May letter and the formal grievance to indicate that the Shillcocks felt that he had been taking too long to prepare the motion (2T 27-28). With regard to the motion, respondent testified that, between March 1992 and July 1992 (when the grievance was filed), he worked on a brief but failed to file the motion. Despite respondent's statement to Olivo in his May 14, 1992 memo that the motion would be filed by the following week, respondent never advised the latter that it was

not completed. Respondent explained that he was working on it "with the time that [he] had available" (2T 48). He testified that he spent "at least four hours" on the brief (2T 64):

> Well, in order to get a matter such as this restored here, you have to provide the cases for it. You have to write the certifications for it. You have to provide the reasons for the nonprosecution of it. You have to take time, put it together in a motion to send it in with your certification that the other party has not been under any degree of prejudice here, and it's my understanding that the courts will, and they have in the past, restore cases such as this. And that there was no hurry for this. I was under no time constraint that I was aware of that you have to do this immediately here. I had a lot of other things in the office that were going on and I had to prioritize my work. I thought nothing of the fact that this took some period of time to do this.
> [2T 48].

As noted above, on July 16, 1992, Laddey, the DEC investigator/presenter, wrote to respondent via certified mail, advising him of the Shillcocks' grievance and requesting a reply thereto within two weeks. Respondent received the letter on July 21, 1992. However, no reply was forthcoming. Laddey telephoned respondent at his office on August 7, 1992, leaving a message on his answering machine. Respondent did not return his call. Although Laddey again telephoned respondent, on August 24, 1992, no one answered and there was no answering machine. With regard to the two telephone calls, respondent alleged that he did not receive the messages. In response to statements by Laddey regarding a strange sound on the telephone, instead of an answering machine, respondent explained that it was his belief that it was probably his fax machine (See also Exhibit R-1).

The formal complaint was filed on November 11, 1992. Respondent requested, and was granted, an extension of time to file an answer. Respondent's answer was filed on December 14, 1992. His verification was filed on December 18, 1992. Exhibit R-1 also contains a "speed memo" from respondent to Laddey, dated December 17, 1992, stating that he had not yet received the substitution of attorney from Olivo or an offer to compensate him for his services or disbursements.

According to respondent, on July 23, 1992, he wrote to Laddey, care of Thomas R. Chesson, Esq., Secretary of the DEC, to respond to the grievance. Respondent stated that, thereafter, he did not receive any further correspondence until the filing of the formal complaint (2T 10-11). Chesson, who testified at the hearing, stated that he never received this correspondence from respondent. That letter (Exhibit R-4) was addressed with an incorrect zip code and respondent claimed that it was probably not delivered to Chesson's law firm. The record does not reveal whether the post office returned letter to respondent. Chesson received a letter dated November 23, 1992 from respondent, referencing and attaching a copy of the July 23, 1992 letter. Respondent's November 23 letter set forth a personal difficulty, specifically, the death of a family member, necessitating a ten-day extension of time to file an answer. By letter dated November 30, 1992, (Exhibit R-3), Chesson informed respondent that his answer was overdue, that the failure to file an answer was a violation of RPC 8.1(b) and that the formal complaint had been amended to allege a violation of that

rule. Chesson's letter made no reference to respondent's November 23, 1992 letter. However, Chesson sent a second letter to respondent, dated December 1, 1992 (Exhibit R-4), acknowledging receipt of his November 23, 1992 letter and stating, "[t]his will confirm that your Answer must be filed with the District X Ethics Committee by **Friday, December 11, 1992.** The Answer was originally due on November 29, 1992." [original emphasis]. Respondent argued that, given that he had "a bona fide problem" and requested the extension of time to file his answer in a timely fashion, he did not violate RPC 8.1(b).

At the hearing, respondent remarked:

> I believe I've done what was necessary for these people under the circumstances here and that there is no cause for this complaint to have been issued in the beginning. I don't know what happened. The fact that the Committee didn't get my letters [sic]. As Mr. Chesson pointed out, there was a digit missing a box designation on the zip code. I don't know if that was the cause of this or what the story is here, but as far as I was concerned I wasn't paid for my costs and I was not going to proceed on this unless I was. That's why I had stopped. I had notified the client. There are letters in the file as to this and I don't believe that I've done anything legally wrong, morally wrong, or ethically wrong in this matter.
> [2T 28-29].

The record does not reveal the current status of the Shillcocks' claim.

The DEC found respondent guilty of a violation of RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate), RPC 3.2 (failure to expedite litigation and to treat with courtesy all persons involved in the litigation process), RPC 4.1(a)(1) (making a false statement of fact to a third party), RPC 8.4(a)

(failure to cooperate with the DEC, constituting a violation of the Rules of Professional Conduct in general).

CONCLUSION AND RECOMMENDATION

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

The DEC determined that respondent violated RPC 1.3, RPC 1.4(a) and (b), RPC 3.2, RPC 4.1(a)(1) and RPC 8.4(a). The DEC based its finding of a violation of RPC 8.4(a) on respondent's failure to cooperate with the DEC. This is a violation of RPC 8.1(b) and, as noted above, the complaint was appropriately amended to reflect this charge. However, the Board has determined that RPC 8.1(b) was not violated here. Respondent's answer was filed three days after the extended due date set by Chesson. The record contains a "speed memo" to Chesson from respondent, dated December 12, 1992, stating that, when the latter went to his office on Friday, December 11, 1992, he found it without power and, therefore, was unable to have access to the answer to the complaint, which was on his computer. The answer was provided on the next business day, December 14th.

With regard to the failure to reply to the original grievance, the record does contain a timely response addressed to Laddey via Chesson, but misaddressed. Further, Laddey stated that he made two

telephone calls to respondent, leaving a message on one occasion and on the other hearing a noise on the other end of the telephone. Respondent's testimony that it was likely his fax machine seems credible. Laddey should have made another attempt to contact respondent after that call. The Board, therefore, is unable to agree with the DEC that respondent violated RPC 8.1(b). Similarly, the Board found no clear and convincing evidence of a violation of RPC 4.1(a)(1), i.e., that respondent misrepresented to Olivo that he was taking steps to have the complaint reinstated. (The complaint did not charge respondent with a violation of RPC 8.4(c) by misrepresenting to his clients that their case was progressing normally when, in fact, it had been dismissed. The DEC made no findings in this regard, despite extensive testimony on the subject at the DEC hearing. Like the DEC, the Board makes no findings on this score inasmuch as the complaint did not charge respondent with this violation).

With regard to a violation of RPC 1.1(a), given respondent's failure to arrange for service of the complaint, the fact that he allowed the complaint to be dismissed, rather than advance $150 for costs, and his failure to have the complaint reinstated, the Board finds clear and convincing evidence of gross neglect on respondent's part.

Much of this record is less than clear. For example, respondent's file contains the Shillcocks' January 24, 1992 letter to respondent with a memo from him dated January 28, 1992. There was no receipt stamp at respondent's office. According to the

Shillcocks, the certified letter was returned to them. They did not send it by regular mail until early March (1T 48). Therefore, respondent did not receive the letter until early March. Respondent argued that they must have sent it by regular mail in January, as well as by certified mail. Either the Shillcocks' recollection is mistaken or respondent fabricated a document. The record is not clear. Respondent also testified that he never refused certified mail but, rather, had difficulty with his mail delivery (2T 22-23, 57). The record, again, is not clear. Similarly, it is hard to imagine that the Shillcocks did not receive any of respondent's memos or letters to them after March 1989.

One of the key issues in this matter is who was paying for costs of litigation. If respondent's argument - that he never agreed to advance the costs of litigation in behalf of his clients but, rather, would bill them and accept whatever amount they could pay - is accepted, then his failure to act may be understandable. On the other hand, the Shillcocks testified that they were unable to advance costs and that respondent agreed to be reimbursed at the time of settlement. Mrs. Shillcock testified that she had discussed with respondent their inability to advance the funds and her concern over the language in the retainer agreement they signed with respondent, and that respondent agreed to wait until the litigation was concluded. The retainer agreement itself is not clear and allows for advance of costs by respondent ("The Law Firm will either require that you pay these expenses in advance or that

you repay the Law Firm if they make these payments for you." Exhibit C-3). It is unlikely that this was a simple misunderstanding between the parties. It is also unlikely that the Shillcocks went through the trouble of hiring respondent, only to later walk away from their claim, rather than pay $150, or any part thereof. The fact that they later retained Olivo to pursue the matter also supports the Shillcocks' posture. Further, respondent's file contains several letters from the Shillcocks to respondent inquiring about the status of the case. If they had already been made aware that the $150 was needed, as respondent claims, and/or that their complaint had been dismissed, then their letters do not make sense.

A great deal of testimony was offered, at the ethics hearing, as to respondent's inability to contact the Shillcocks due to their changes of address during the pendency of their claim. However, this issue is without merit. The Shillcocks did receive some correspondence from respondent during this period and his file contains their subsequent addresses. Further, respondent and the Shillcocks testified as to telephone conversations between them. Clearly, respondent could have easily contacted his clients.

Respondent also took the position that the Shillcocks were ignoring him. Again, it is unlikely that the Shillcocks would have abandoned a potentially valuable personal injury claim for no apparent reason.

With regard to his delay in filing the motion, respondent argued that he "was under no time constraint" (2T 48). This

argument, however, is without merit. First, respondent would have known that his clients would naturally want to have their case resolved as quickly as possible. Second, although the complaint was dismissed without prejudice, had respondent then acted to serve the complaint and have the case restored within one year, it would have been far more uncomplicated under the provisions of R.1:13-7. Of course, by the time respondent wrote the May 14, 1992 memo to Olivo, the one year had already passed. Perhaps, in respondent's mind, since the one-year provision had elapsed, it made no difference how long it took for his motion to be filed. Respondent's cavalier attitude toward restoring his clients' case is far below the standards expected of a member of the bar.

In sum, respondent's conduct in this matter violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b) and RPC 3.2. In the past, a public reprimand has been imposed for conduct similar to that of respondent in this matter. In re Stewart, 118 N.J. 424 (1990) (where the attorney was guilty of gross neglect in an estate matter and failure to keep his client informed about its status. Stewart had been previously privately reprimanded for personally paying monies toward the settlement of an insurance claim and offering to pay monies toward the resolution of a matrimonial settlement); In re Rosenblatt, 114 N.J. 610 (1989) (where the attorney grossly neglected a personal injury matter for four years. During that four-year period, the attorney repeatedly ignored the client's requests for information. He had been privately reprimanded seventeen years earlier for neglect in two matters) and In re

Williams, 115 N.J. 667 (1989) (where the attorney was guilty of gross neglect in one matter, failure to communicate in one matter, failure to file an answer and lack of cooperation with the DEC).

As noted above, this is not respondent's first brush with the disciplinary system. He was publicly reprimanded in July 1992, for releasing escrow funds without the consent of the seller in a personal real estate matter and for failing to cooperate with the disciplinary authorities. Respondent was disciplined while he was still engaged in the misconduct now in question.

In light of the foregoing, a three-member majority of the Board recommends that respondent be publicly reprimanded. Two members dissented, believing that a three-month suspension is warranted. One member recused himself. Three members did not participate.

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

Dated: 6/9/1994 By: Raymond R. Trombadore

Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board