X11-91-43E
X11-93-12E

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-097

IN THE MATTER OF

ARTHUR J. BREITKOPF

AN ATTORNEY AT LAW

Decision
of the
Disciplinary Review Board

Argued: June 21, 1995

Decided: December 4, 1995

Joseph P. Depa, Jr. appeared on behalf of the District XII 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 on a recommendation for discipline filed by the District XII Ethics Committee ("DEC"). Respondent was charged with misconduct in two separate matters, which were consolidated for hearing. The formal complaints collectively charged respondent with violations of RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(a) (failure to keep his client reasonably informed and to promptly comply with reasonable requests for information); RPC 3.3(a)(1),(2) and (4) (knowingly making a false statement of material fact or law to a tribunal; knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client; and failing to take reasonable remedial measures where a lawyer has learned of the

falsity of evidence he has offered); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities). Respondent did not file an answer to either of the formal complaints.

Respondent was admitted to the New Jersey bar in 1948. On October 10, 1975, respondent was temporarily suspended for failure to keep records in accordance with R. 1:21-6. He was subsequently reinstated on June 4, 1979, after the Board concurred with the report filed by the District V Ethics Committee, dismissing all charges pending against respondent and recommending his reinstatement. Respondent's reinstatement was conditioned upon supervision of his trust and business accounts for one year.

Subsequently, on June 22, 1990, respondent was privately reprimanded for failure to keep his client reasonably informed in a negligence matter. Specifically, respondent failed to advise his client that her complaint had been dismissed for failure to answer interrogatories.

THE PAN URBAN MATTER (XII-91-043E)

In or about 1983, the City of Elizabeth instituted a tax foreclosure action covering several properties, including 138 Magnolia Avenue. At some unidentified point thereafter, respondent was retained by Pan Urban Associates, Inc. (hereinafter "Pan Urban") to represent its ownership interest in the Magnolia Avenue property. On or about March 19, 1986, respondent filed a notice of

motion to intervene in the foreclosure action in behalf of Pan Urban. In support of that motion, respondent filed and signed a certification representing that the City of Elizabeth, by formal action, had previously waived any taxes on the property, that the City and had granted immunity from further taxation; that the tax sale certificates were invalid due to the waiver and immunity and that all taxes claimed due by the City had been paid in full. Exhibit P-1. The final paragraph of respondent's certification read:

> The foregoing statements made by me are true to the best of my knowledge, information and belief; I am aware that if any of the foregoing statements is wilfully false, I may be punished according to law.
> [Exhibit P-1 at 3]

Respondent's motion to intervene was granted. Thereafter, the attorney for the City of Elizabeth took the deposition of a Pan Urban representative and of respondent. During that deposition, respondent admitted that he had no documentary or other proof to support the statements made in his certification. In fact, as it turned out, those statements were not true.

During his testimony before the DEC, respondent admitted that he had no personal knowledge of the statements contained in his certification. He explained that he had relied upon information provided to him by others, including Calvin Hurd, a principal of Pan Urban. Respondent testified that although he had attempted to verify the information contained in his certification, it was very difficult to obtain information from the City clerk.

Respondent maintained that, when he learned of the falsity of his representations, he negotiated the return conveyance of the property to the City of Elizabeth. It is not clear when, exactly, he entered into those negotiations, as respondent himself gave three different versions of their timing. Respondent took no other action to remedy his misrepresentations, such as filing an amended certification with the court. Respondent was not able to explain why he had not simply elected to have Hurd submit the original certification, since it was Hurd who allegedly gave respondent the information.

The complaint also charged respondent with a failure to cooperate with the DEC investigation. The presenter produced three letters to respondent requesting a reply to the original grievance. Exhibits P-7 through P-9, dated December 10, 1991, January 7, 1992 and January 21, 1992. After the presenter forwarded the first letter, he received a telephone call from someone in respondent's office advising him that respondent had been admitted to the hospital. However, neither respondent nor anyone else in his behalf ever replied to the presenter's subsequent letters requesting more specific information about the timing of respondent's anticipated recovery. Ultimately, in January 1993, the DEC investigator filed a formal ethics complaint. Respondent did not file an answer to the complaint.

Respondent testified that he had developed an aneurysm in December 1991, for which he had been hospitalized. In February 1992, he had undergone quadruple bypass surgery. Respondent

testified that, thereafter, he was in and out of the hospital through July 1992. It was not until the end of 1993 that he was able to return to work on a limited basis. During that period, however, he "lost touch with everything" and was told that he "was a walking time bomb and [was] going to die." T31, 140.[1] While respondent acknowledged that he had received the presenter's letters, he did not specifically recall receiving them as "that whole year was like a blank" to him. T140. When respondent did return to work in 1993, although work "piled up," he was able to do only a limited amount as he tired easily and still continued to experience pain. Respondent expressed remorse over his failure to reply to the presenter's several letters.

Respondent testified that, while he presently practices law, he continues to experience health problems. He added that, for example, he continues to tire easily and to experience pain; he attempts to nap every day but has difficulty sleeping because of the pain. Respondent is seventy-five years old.

* * *

The DEC found that, while "it was poor lawyering to offer his own, incompetent certification in support of the motion to intervene, there [was] insufficient proof that respondent was aware of the inaccurate statements set forth therein until after it was filed." Hearing panel report at 7. The DEC, therefore, dismissed

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[1] "T" refers to the DEC hearing transcript of July 5, 1994.

all substantive violations, except for RPC 3.3(a)(4), which provides as follows:

> A lawyer shall not knowingly:
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The DEC found that respondent's certification led to the intervention in the suit and that, at least as of the date of his deposition, he was aware that the veracity of the information offered in his certification was questionable. According to the DEC, respondent had a duty, at that point, to attempt to verify the truthfulness of his statements. The DEC specifically found that respondent knew of the falsity of his statements shortly after his deposition in December 1986 and that he did nothing to "remediate the situation" until 1988. Presumably, the remediation to which the DEC referred was the deeding back of the property to the City, though again it is not clear when exactly that occurred. The DEC found that respondent's subsequent actions were not a "reasonable remedial measure," and therefore violated RPC 3.3(a)(4). The DEC also found respondent guilty of a violation of RPC 8.1(b) for his failure to reply to the investigator's requests for information or to file an answer to the complaint. While recognizing the magnitude of respondent's illness, the DEC found that a "simple call to advise the investigator of respondent's condition and period of convalescence would have been sufficient to explain the lack of reply." Id. at 10. Furthermore, the DEC found that, while

respondent admitted having returned to work in late 1993, he made no effort to contact the presenter or the panel chair, knowing that the matter was pending and that it had been scheduled for a hearing.

The DEC determined that a "public admonition" was appropriate form of discipline for respondent's violations, in light of his ill health and his lack of prior ethics violations. (In fact, respondent was privately reprimanded in 1990 and temporarily suspended for a period of approximately four years nearly twenty years ago).

<u>THE CAULTON MATTER</u> (XII-93-012E)

In or about April 1990, respondent was retained by Johnie Caulton (hereinafter "grievant") to represent him in both a criminal action for possession of a handgun and a civil action against the arresting police officers. Grievant maintained that several Newark police officers beat him with batons and blackjacks about his arms and legs during the course of his arrest. Grievant initially met with respondent in the presence of Auguster Cherry, who was also arrested with him and whom respondent also agreed to represent.[2]

It is the scope of respondent's representation that is at issue here. While grievant steadfastly maintained that he retained respondent to represent him in both the criminal matter and in a

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[2] Cherry also filed a grievance against respondent subsequent to this hearing. That matter remains unresolved.

civil action for damages against the arresting officers, respondent insisted that he was retained only in the criminal matter. There was no written fee agreement setting forth the nature and scope of representation, as required by RPC 1.5, although respondent was not charged with a violation of that rule.

Grievant testified that, when he and Cherry initially met with respondent, he told respondent that he had been beaten by the police officers and that they had stolen money from his cash drawer at his place of business, where he was arrested. Both grievant and Cherry testified that respondent told grievant that he had a "good case," that he would "put the charge against the policeman" and that he would wait to proceed on it until the criminal case was concluded. T80. A review of respondent's intake notes indicates that respondent was aware of grievant's allegations that the officers had beaten him and had stolen his money. In addition, the notation "make complaint to Internal Affairs" also appears in those notes. Exhibit R-2.

Grievant testified that respondent referred him to "his doctor," Dr. Pollen. He began treatment with Dr. Pollen on June 6, 1990. A copy of Dr. Pollen's statement for professional services was entered into evidence. Exhibit P-3. At the top of the statement appears the phrase "LITIGATION DANIEL BREITKOFF, 9 MONMOUTH RD, ELIZ. 355-4666." Although Daniel is not respondent's first name, his office address was correctly designated. The statement also contained several instances of the notation "attorney billed."

Also produced at the DEC hearing was a copy of an "initial comprehensive evaluation" by Dr. Pollen, which respondent retrieved from his file. The evaluation, dated June 6, 1990, was not addressed to anyone in particular. Respondent testified that this evaluation was attached to grievant's presentence report in his file.

In any event, grievant testified that, after he entered his guilty plea on the criminal charges on March 19, 1991, he began to telephone respondent on a regular basis to learn the status of the civil action. On at least one occasion, respondent told grievant not to worry and that he was "working on it." T85. At some point, grievant's doctor began to question grievant about the status of the civil matter, apparently out of an interest to be compensated for his professional services. Grievant, in turn, began to call respondent frequently for status reports. However, he testified, he was never able to speak with respondent and respondent never returned his calls. Grievant estimated that he placed over one hundred telephone calls to respondent and even spoke with respondent's wife on several of those occasions. While grievant frequently saw respondent at a local restaurant, he never approached respondent to learn the status of his civil case because he did not wish to impose on respondent's personal time.

Grievant became discouraged by respondent's failure to communicate with him. He, therefore, sought the advice of another attorney in October 1992. That attorney wrote to respondent in December 1992 and declined to accept grievant's case because

respondent had failed to file a Title 59 notice of claim with the City of Newark. See Exhibit P-5. By that date, the statute of limitations against all defendants had run.

Respondent testified that it was never his intention to represent grievant and Cherry in any civil action. In fact, he maintained, he advised both at their initial meeting that he would handle only their criminal matters and that, if they wished to sue the officers involved, they would have to consult with another attorney. He never reduced this advice to writing or advised them of the need to file a notice of claim within ninety days of the alleged incident. Respondent further testified that he advised grievant to pursue his complaints with the internal affairs division of the police department. He was willing to assist grievant in that endeavor because he believed it might somehow be helpful in the disposition of the criminal charges against him. In fact, respondent accompanied grievant to internal affairs on at least two occasions. He stated that any phone calls he received from grievant after the conclusion of the criminal matter dealt with the status of the disciplinary matter against the officers. At some point, respondent lost interest in that aspect of grievant's complaint because he began to believe that grievant was pursuing that avenue to "get even with" the officers. T151.

Respondent disputed that he referred grievant to Dr. Pollen or that he even knew Dr. Pollen. Respondent pointed to the fact that Dr. Pollen apparently did not even know respondent's proper name. Respondent assumed that Dr. Pollen obtained respondent's name and

address by asking grievant who his attorney was. It is noteworthy that a photocopy of respondent's business card appears in a group of medical exhibits, which includes Dr. Pollen's bills. See Exhibit P-4. It is not clear from whom these exhibits were obtained.

Finally, respondent testified that he believed that grievant was pursuing the ethics complaint against him because he did not wish to pay the balance of the bill, which respondent has been attempting to collect by visiting grievant's place of business. Grievant denies that he owes respondent any additional fee.

* * *

The DEC found that respondent had agreed to represent grievant in a civil action against the arresting officers and that he failed to pursue that action in his behalf, in violation of both RPC 1.1(a) and RPC 1.3. The DEC further found respondent guilty of a failure to communicate with his client and to reply to his reasonable requests for information, in violation of RPC 1.4(a). The DEC based its determinations essentially upon a credibility assessment of the witnesses and, particularly, upon what it described as inconsistencies in respondent's testimony. Finally, the DEC found respondent guilty of a violation of RPC 8.1(b) for his failure to reply to the DEC investigator and for his failure to file an answer to the formal complaint. The DEC recommended "public discipline" for respondent's ethics infractions.

* * *

Upon a <u>de novo</u> review of the record, the Board is satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is clearly and convincingly supported by the record. In the <u>Pan Urban</u> matter, respondent was clearly guilty of a failure to cooperate with the DEC, by virtue of his failure to reply to the investigator's requests for information and to file an answer to the complaint. Despite his illness, respondent or his designee could have easily telephoned the investigator to apprise him of the status of respondent's medical condition. Furthermore, once respondent returned to work in late 1993, albeit on a part-time basis, this matter should have taken precedence over all others. Clearly, respondent was aware of the pendency of the matter. If he truly was not physically up to the challenge of confronting this matter, at a minimum he had an obligation to contact the DEC investigator to work out an acceptable solution.

As to substantive findings, the Board concludes that the DEC properly dismissed all charges of a knowing misstatement of facts under <u>RPC</u> 3.3. Respondent's reliance upon information provided by others, combined with his failed attempts at verification, takes this case out of the category of knowing misstatements.

While the DEC properly concluded that respondent was not guilty of violations of <u>RPC</u> 3.3(a)(1) and (2) because he did not know his statements to be false when he made them, the Board cannot agree with the DEC's ultimate conclusion that respondent's

misstatements did not constitute unethical conduct. There can be no doubt that an attorney has an obligation to be candid and to act with good faith toward a tribunal. See, e.g., In re Nigohosian, 88 N.J. 308 (1982) and In re Turner, 83 N.J. 536 (1980). In order for our legal system to function effectively and fairly, courts must be able to rely upon the representations of its officers. If an attorney has been careless in making representations, if he has relied upon inadequate or incompetent sources, if he has failed to take reasonable measures to ensure that his representations have some basis in fact or law, then he has failed the system in the most fundamental way.

More than anyone, attorneys must be held to a higher standard of conduct, particularly when we speak of conduct toward the court that ultimately affects the administration of justice. When a judge reads an attorney's certification, the judge accepts the factual assertions at face value — undoubtedly because they have been made by an attorney — an officer of the court. The court expects that an attorney has made reasonable efforts to ensure the accuracy of his or her factual statements.

Here, respondent's reliance upon his client's word, without independent verification and without specific disclosure to the court of the basis of his certification, did not approach fulfillment of his obligations toward the courts. If respondent did not wish or was not able to independently verify the accuracy of the facts asserted in his certification, he should have required his client, upon whom he relied, to prepare and sign the

certification or, at a minimum, he should have disclosed to the court his inability to verify the accuracy of the information. Respondent's failure to do either violated not only the spirit, but also the letter, of the Rules of Professional Conduct — specifically, RPC 3.1, which provides, in relevant part:

> A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous . . . . [emphasis supplied].

Moreover, respondent's failure to independently verify the facts he certified to be true constitutes gross neglect, in violation of RPC 1.1(a).

Finally, while RPC 3.3(a)(4) does encompass misstatements which, when initially made, were not knowing, the Board cannot agree that the record clearly and convincingly established that respondent's actions, following his depositions, fell short of a reasonable remedial measure. It would appear that the DEC's finding in this regard rested upon the timing, as opposed to the nature, of respondent's actions upon learning of the falsity of the factual recitations contained in his certification. Respondent's negotiation to deed the property back to the city appears to have been an appropriate response to the situation. A corrective affidavit by him would have led to the same result, albeit by summary judgment, as opposed to voluntary settlement. However, the DEC was concerned that it appeared to take over one year after the deposition — and only after respondent received a certification from a city representative disputing the veracity of respondent's

factual assertions — for respondent to take any corrective action whatsoever. There was no evidence that disclosed the date when the deed was signed. Moreover, there was no evidence to suggest that respondent did not attempt, as he alleged, to verify the statements contained in his certification between the date of the deposition (December 1986) and the date of the City representative's affidavit (February 1988). A City representative — the records' custodian — testified before the DEC. Yet no testimony was elicited from him to dispute respondent's allegation that he attempted to verify the contents of his certification during that interim. Under these circumstances, the Board cannot find, by clear and convincing evidence, that respondent's conduct violated RPC 3.3(a)(4).

In the Caulton matter, again, respondent was clearly guilty of a failure to cooperate, in violation of RPC 8.1(b). The Board, however, cannot agree with the DEC's findings of gross neglect and lack of diligence. Unlike the position taken by the DEC, the Board does not view the documentary evidence to contradict respondent's version of the events. Indeed, consistent with respondent's testimony, respondent's initial intake notes indicate that a complaint to internal affairs should be made. Grievant's understanding of respondent's proposed actions — to "put the charge against the policeman" — is at least as consistent with an internal affairs complaint as it is with a civil action complaint. Furthermore, there is nothing in respondent's intake notes that would indicate any intention to pursue a civil action. For example, typically, the extent and nature of injuries would be

explored as well as the name of medical providers, such as the emergency room grievant allegedly visited. Such information would have been essential, not only to comply with Title 59 notice requirements, but also to obtain the documentation necessary to process a personal injury claim.

In addition, it is not unusual for a medical provider to obtain from a patient the name of that patient's attorney for purposes of bill protection. The mere notation of respondent's (incorrect) name on Dr. Pollen's bill, as well as a notation that the attorney was billed, does not, of itself, establish that litigation was pending or undertaken by the attorney. Finally, the fact that respondent produced from his file Dr. Pollen's medical report does not establish that he ordered the report or that he undertook to handle civil litigation in grievant's behalf. Respondent testified that Dr. Pollen's report was appended to a presentence report in his file. The Board finds that statement to be credible. Apparently, it is not an unusual practice for a probation officer to order such a report. Again, noteworthy is the fact that the report was not addressed to respondent or any other individual. Indeed, if respondent had ordered such a report from Dr. Pollen, one would expect that the doctor would have first extracted from him a protection letter. No such evidence was ever produced.

To be sure, respondent's actions in this matter fell short of good practice. To begin, there is no doubt that grievant was under the misimpression that respondent was, indeed, handling a personal

injury matter for him. The responsibility for that misimpression must rest, to a great extent, with respondent. Had he provided grievant with a written fee agreement, as required by RPC 1.5, grievant would have known that respondent was not pursuing any such action in his behalf. Respondent's conduct, therefore, violated RPC 1.5. (While this particular RPC was not formally charged, the issue was fully litigated at the DEC hearing). Furthermore, respondent should have clearly explained to grievant that he was not undertaking his representation in the civil action and should have followed that advice with a writing setting forth grievant's legal rights and obligations.

The issue of the appropriate quantum of discipline remains for respondent's failure to reduce his fee arrangement to writing, his failure to cooperate with the DEC and, finally, for submitting to a court a certification containing inaccurate factual information. Respondent's conduct in this regard parallels that seen in In re Mark, 132 N.J. 268 (1993). In that case, the Court suspended for three months an attorney who first made an oral misrepresentation to the court, albeit negligently, and who then fabricated evidence to support that misrepresentation as well as a subsequent certification to the court. Significantly, at every point at which the attorney acted, he did so with the belief that the factual representations he was making were accurate, although he repeatedly failed to review the source of his belief prior to making those representations. Cf. In re Mazeau, 122 N.J. 244 (1991) (attorney publicly reprimanded for knowingly making a false statement of

material fact in a brief with knowledge that the court may have tended to be misled by the misstatement).

Respondent's conduct in this matter is, however, distinguishable from attorney Mark's conduct. While Mark's misrepresentations were not the result of a specific design to mislead the court — but rather of negligent conduct on his part — they were repeated and of a nature that directly affected the conduct and outcome of the trial. Respondent's conduct in this matter was limited to one instance of certifying inaccurate factual information to a court. Although it is true that the inaccuracies remained uncorrected over a substantial period of time, there was no evidence offered to dispute respondent's testimony that he unsuccessfully attempted to verify the truthfulness of the information contained in his certification on several occasions following his deposition.

Under a totality of the circumstances, including respondent's failure to fully cooperate with the DEC, a four-member majority of the Board has determined that respondent's misconduct merits a reprimand. Three members would have imposed a three-month suspension. Two members did not participate.

The Board further directs that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/4/95

By: ______________________
Lee M. Hymerling
Chair
Disciplinary Review Board