

JB-92-18E

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 95-081

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IN THE MATTER OF :  
ROBERT B. CLARK, :  
AN ATTORNEY AT LAW :

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Decision of the  
Disciplinary Review Board

Argued: April 19, 1995

Decided: July 7, 1995

Peter S. Valentine appeared on behalf of the District VB 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 VB Ethics Committee (DEC). The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 8.1(b) (failure to cooperate with the DEC). Respondent did not file an answer to the complaint.

Respondent was admitted to the New Jersey bar in 1979. He maintains an office in East Orange, Essex County.

Respondent was publicly reprimanded by order dated May 1, 1990. In four matters, respondent failed to act diligently or to communicate with clients. In a fifth matter, he failed to return any part of a \$545 retainer, despite promises to the client.

In November 1988, Stephen Garris retained respondent in a civil matter against Trump Castle and Casino for an alleged assault and wrongful discharge of employment. It is unclear if the case had already been filed by another attorney or if respondent did so. Mr. Garris wanted to retain an attorney outside of the Atlantic County area because he feared that local attorneys were subject to the defendant's influence. There are no allegations that respondent failed to adequately represent Mr. Garris early in the matter. Respondent, however, failed to appear for a mandatory Early Settlement Panel (ESP) scheduled for May 31, 1989. Mr. Garris, who at the time had no knowledge that the ESP had been scheduled, also failed to appear.

Respondent testified that he received notice of the ESP in or about April 1989 and contacted the judge's law clerk to explain that he had a criminal trial scheduled for that day. He was instructed to speak with defense counsel. According to respondent, he spoke with an associate at the law firm representing the defendant. That individual, whose name respondent did not recall, allegedly told respondent that they would consent to an adjournment and that respondent would hear from the court with regard to a new ESP date. (It is not clear whether the associate stated that he would contact the court, rather than respondent.) Based on the associate's representation, respondent did not appear for the ESP on May 31, 1989.

Respondent received no information from the court or his adversary about the rescheduling of the ESP. Respondent believed

that the case was still pending. It was not until much later, when he received a notice from the court, that he learned that the case had been dismissed in June 1990. There is no explanation in the record for the one-year span between the date of the ESP and the dismissal of the case. It is also not clear when respondent received the notice of dismissal; it may not have been until 1991. Respondent admitted that he should have contacted the court and his adversary to inquire as to the proceedings prior to his receipt of the information from the court (2T52).<sup>1</sup>

Respondent testified that, after learning of the dismissal, he did not attempt to reinstate the case because, in the intervening time period between the ESP date and the date respondent learned of the dismissal, Mr. Garris had received an offer of settlement on a pending worker's compensation case against Trump Castle and Casino. (That case was handled by another attorney.) According to respondent, at some time prior to December 1991, Mr. Garris told him that he would accept the settlement offer, drop the civil case and consider the matter closed and behind him. Respondent testified that he did not confirm this information in writing with Mr. Garris because the two had a very close relationship. Based on Mr. Garris' intent to drop the civil case, respondent took no action to have the case reinstated after he learned of its dismissal.

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<sup>1</sup> 1T refers to the transcript of the hearing before the DEC on October 6, 1994. 2T refers to the transcript of the hearing before the DEC on November 9, 1994.

According to respondent, the difficulty in this matter arose subsequently. Mr. Garris had two pending worker's compensation matters. After the dismissal of the civil action, the defendant argued that the bulk of Mr. Garris' injuries stemmed from the incident giving rise to the first worker's compensation claim, which was the one tied to the civil action in question. When that case was dismissed, the settlement offer was withdrawn or diminished. Respondent learned this information from Mr. Garris at some point prior to December 1991. Respondent did not move to reinstate the case at that time because Mr. Garris told him that the matter was "still up in the air" and that the attorney handling the worker's compensation claims would contact respondent (2T70). (The record does not reveal if that attorney did so.) Mr. Garris ultimately received \$8,500 for his first worker's compensation case and nothing for the second.

Mr. Garris did not recall instructing respondent to allow the civil case to be dismissed. He testified that he tried unsuccessfully, via telephone, letter and visits to respondent's office, to ascertain the status of his case. According to Mr. Garris, respondent did not reply to his calls or letters and would not see him when he went to his office, offering excuses and saying Mr. Garris needed to make another appointment.

It is unclear when and from whom Mr. Garris learned that his case had been dismissed. (In his grievance, he stated that respondent told him of the dismissal; in his testimony, he stated that he learned of it after he contacted the court.) Mr. Garris

testified that, on an undisclosed date, he met with respondent. At that time, Mr. Garris told respondent that he would give him the money to file a motion to reinstate the case and respondent agreed to do so. Respondent did not reinstate the case and thereafter did not communicate with Mr. Garris. As a result of respondent's failure to communicate with Mr. Garris, he retrieved his file from respondent in the latter part of 1991. Mr. Garris, thereafter, wrote to the court on October 15, 1991 to obtain information on the status of his case. In reply, the court sent him two letters, dated December 9, 1991 and January 8, 1992, informing him that the case had been dismissed for failure to appear at the ESP and instructing him to file a motion if he wanted the case to be reinstated.

In late 1991, Mr. Garris contacted William Bromley, Esq., in connection with this matter. (Mr. Bromley died two months before the DEC hearing.) Mr. Bromley made several attempts to communicate with respondent via telephone and letters dated December 2, 1991 and December 12, 1991. In his December 2, 1991 letter, Mr. Bromley confirmed an earlier conversation with respondent, wherein respondent had told him, in accord with his testimony before the DEC, that the dismissal had resulted from respondent's failure to attend the ESP and that his adversary had led him to believe that he would make arrangements to have the matter postponed. Mr. Bromley's letter went on to advise respondent that he, Mr. Bromley, would take over Mr. Garris' representation if respondent immediately had the matter reinstated and then advised Mr. Bromley

when he had done so. Mr. Bromley's December 12, 1991 letter served to remind respondent that he had not replied to the earlier letter. Mr. Garris also sent a letter to respondent on December 13, 1991, asking respondent to file a motion to have the case reinstated. Respondent did not reply to Mr. Garris' letter.

On February 6, 1992, Mr. Bromley filed the motion to reinstate the case. By order dated February 21, 1992, the motion was denied, based upon the length of time - over thirty-two months - that had passed since the dismissal. Mr. Bromley, thereafter, filed a malpractice suit against respondent. On March 11, 1993, a default judgment was entered against respondent for \$33,398.10.

According to respondent, he, in fact, communicated with Mr. Bromley on several occasions, provided information as to what had occurred and signed a substitution of attorney that Mr. Bromley had forwarded to him. In response to Mr. Bromley's December 2, 1991 letter, respondent telephoned the court to ascertain the proper procedure to reinstate Mr. Garris' case. He was told that a motion was required. Respondent's position, however, was that he would assist Mr. Bromley by providing information and an affidavit, but that he would not file the motion to reinstate, as Mr. Bromley had requested. Respondent felt that he was no longer Mr. Garris' attorney and he did not want to spend the money to have the case reinstated. (Respondent never received any compensation from Mr. Garris.) Respondent told Mr. Bromley that he should file the motion himself.

With regard to the malpractice case Mr. Garris filed against him, respondent testified that he made a determination not to defend himself in that matter. He conceded that that was "a bad choice" (2T98). The record does not clearly reveal why respondent did not defend himself. In connection with the default judgment, respondent testified that Mr. Garris has filed for bankruptcy and that he, respondent, has worked out a payment plan with the trustee in bankruptcy. Respondent had made one payment as of the DEC hearing.

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By letter dated March 27, 1992, the DEC investigator, Benjamin M. DelVento, Esq., requested that respondent reply to the allegations in Mr. Garris' grievance. Respondent did not reply. Thereafter, by letter dated June 17, 1992, Peter S. Valentine, Esq., who replaced Mr. DelVento as the investigator, requested that respondent answer the allegations in the grievance. Again, respondent did nothing. The formal complaint was filed on February 11, 1993. As noted above, respondent did not file an answer.

At the start of the first day of hearing in this matter, respondent appeared and informed the DEC panel that his mother, who lived in Michigan, had suffered two strokes the week of the hearing and was critically, perhaps terminally, ill. He then announced that he meant no disrespect to the disciplinary system or to the hearing panel, but that he was leaving the hearing to be with his mother. Mr. Garris went on to testify on that date and

the transcript was provided to respondent who, on the second day of hearing, cross-examined Mr. Garris and also testified.

With regard to his failure to cooperate with the DEC, respondent explained his difficulty in replying, particularly in light of the emotional trauma stemming from his earlier public reprimand. Respondent stated that

[w]hen this [ethics matter] hit, even though at the time I felt that I had a viable explanation and defense for what had happened and all of the facts leading up to it, as a result of that, it coming so close, relatively close on the heels of this other public reprimand, I went into an emotional tail spin with regard to it and I couldn't face it, address it. It's not -- I'm not suggesting that what I did was, in fact, defensible. What I'm saying is that it's human, it's looped, and as a result of a combination of factors I couldn't look at it.

Now, what -- leading up to this, what had happened, though, was that I was forced to face several things. I had to appear as a result of some fee arbitration matters. I had to make appearances and I had to go down to Trenton, and this was one of the things that was on the list. I thought I was going to be able to deal with this last month and address it, and then my mother's illness. But, yes, I understand that that's a violation in and of itself.

What I have sought, I've sought counseling with regard to dealing with the basic issue of who counsels the counselor. I take care of other people's problems. And when I have my own, instead of taking care of my problems, I'll take care of this person and that person and run over here and run over there. And that's exactly what happened. And Mr. Valentine was diligent with regard to his communications and his efforts to get me to respond. And the Attorney Ethics Committee, as a whole, I believe extended me a great deal of patience with regard to my response. But my intent was always to be present to address and to be -- to come in and face the music and face my accuser.

[2T56-58]

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The DEC determined that respondent had violated RPC 1.1(a) and RPC 1.3. The DEC did not find a violation of RPC 8.1(b), based on a lack of clear and convincing evidence that respondent understood the implications of the rule. In light of respondent's previous public reprimand, the DEC recommended the imposition of a three-month suspension and psychological treatment.

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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 been guilty of violations of RPC 1.1(a) and RPC 1.3 and dismissed the charge of a violation of RPC 8.1(b). The Board agrees with the DEC's dismissal of those allegations, not because of respondent's lack of understanding of the rule but because of his contrition and subsequent cooperation with the DEC. Also, in light of the reason for respondent's leaving the first DEC hearing - the serious illness of his mother - the Board cannot find that his conduct in this regard was the product of indifference to or disregard for the disciplinary system. The testimony of respondent and Mr. Garris differed about the course of events in this matter. It is not necessary, however, to reach a conclusion as to the veracity of the parties' testimony in order to find that respondent was guilty of unethical conduct. Specifically, respondent exhibited gross neglect and lack of

diligence, in that he allowed over a year to pass with no information from the court on this matter. At the very least, respondent had an obligation to contact the court to ascertain why the ESP had not been rescheduled. Further, respondent could not blindly rely on his adversary to reschedule the ESP for him. Although respondent testified that, because he does trial work, he was unfamiliar with the procedures in Atlantic County and with settlement panels in general, he had an obligation to familiarize himself with the rules and the consequences of missing an ESP date.

Respondent's actions in connection with Mr. Bromley's request that he file the motion to reinstate might present a closer call. Respondent testified that he was concerned about spending the money to file the motion to reinstate the case. It is true that he could have charged no fee for the motion. Nevertheless, the record does not reveal when Mr. Bromley became attorney of record; once that occurred, respondent no longer had authority to file a motion in behalf of Mr. Garris. Further, given the length of time that had passed since the dismissal, respondent might no longer have been the attorney of record. In view of the Board's inability to find that respondent was still Mr. Garris' attorney, the Board makes no finding of unethical conduct on this score.

Respondent's ethics history causes some concern. As noted above, respondent was publicly reprimanded on May 1, 1990 for misconduct in five matters. Therefore, during the time of the within events, respondent was on notice that his conduct was questionable at best and he should have been more careful with his

clients' matters. Therefore, the Board determines that a reprimand is the appropriate discipline in this case. See In re Stewart, 118 N.J. 424 (1990) (where the attorney received a public reprimand for gross neglect and failure to communicate in an estate matter. Stewart had received a prior private reprimand) and In re Rosenblatt, 114 N.J. 610 (1989) (where the attorney received a public reprimand for gross neglect and failure to communicate in a personal injury matter for four years. He had been publicly reprimanded seventeen years earlier for neglect in two matters).


In addition, the Board determines that respondent should practice law under the supervision of a proctor for a period of one year. One member did not participate.

Respondent shall reimburse the Disciplinary Oversight Committee for administrative costs.

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

7/7/95

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

  
Raymond R. Trombadore  
Chair  
Disciplinary Review Board