

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-205

IN THE MATTER OF :
 :
DONALD B. DEVIN, :
 :
AN ATTORNEY AT LAW :

Decision of the
Disciplinary Review Board

Argued: July 19, 1995

Decided: November 14, 1995

David L. Johnson 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 discipline filed by the District X Ethics Committee (DEC). The formal complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate), RPC 1.5(b) failure to provide a written retainer agreement), RPC 3.2 (failure to expedite litigation), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and failure to cooperate with the DEC (subsequently asserted by the DEC to be a violation of R.1:20-3(f)).

Respondent was admitted to the New Jersey bar in 1969. He has a law office in Dover, Morris County. He was suspended for a period of three months, by Order dated October 4, 1994, for failure to communicate, misrepresentation and conduct prejudicial to the

administration of justice in connection with a foreclosure proceeding and a civil matter. Respondent was reinstated by Order dated July 28, 1995.

In or about 1983, Donald Guritzky and his business partners Domenica and Louis Musto obtained a business loan from Midland Bank and Trust Company ("Midland") in the amount of \$40,000. The loan was secured by real estate owned by Mr. Guritzky. The loan was also personally guaranteed by Mr. Guritzky and the Mustos, making them jointly and severally liable for its repayment.

In or about 1984, the parties defaulted on the loan. Midland instituted a foreclosure proceeding against Mr. Guritzky's real property and a separate action against the Mustos based on their personal liability.

In or about 1985, Mr. Guritzky retained respondent to represent him in the foreclosure action as well as in a Chapter 13 bankruptcy proceeding. Mr. Guritzky paid respondent \$1000. He also gave respondent sixty dollars for the filing fee in the bankruptcy proceeding. Respondent took some action in Mr. Guritzky's behalf in connection with the foreclosure action. That matter was resolved in or about August 1985, when Mr. Guritzky sold the property in question. The proceeds of the sale were more than sufficient to satisfy Midland's lien on the property. Midland was paid \$52,701.68, the full amount due on the loan, including interest. Mr. Guritzky's bankruptcy petition, which was filed in May 1985, was voluntarily dismissed on September 12, 1985, following the settlement with Midland.

On August 28, 1985, as part of their settlement, Midland assigned its chose-in-action against the Mustos to Mr. Guritzky, who sought reimbursement from the Mustos for one-half of the amount he had paid to Midland. Mr. Guritzky believed that respondent was pursuing the matter against the Mustos. Indeed, the record has several indicia of that representation. For example, in a letter dated September 30, 1985 to Richard Sherman, the attorney who represented Mr. Guritzky in the sale of the real estate, respondent asked if the latter had "received the executed documents from [counsel for Midland] so we can proceed against Mr. Musto." Exhibit C-3. Mr. Sherman forwarded to respondent the executed assignment of Midland's rights to Mr. Guritzky. In another letter, dated June 26, 1986, respondent told Mr. Guritzky that he had been in "further contact" with the sheriff and that it would be necessary for Mr. Guritzky to forward \$450 in connection with the foreclosure proceeding against the Mustos' property. Exhibit C-4. Mr. Guritzky forwarded the \$450 on July 7, 1986.

Also in the record are numerous notes Mr. Guritzky made of his telephone conversations with respondent from January 18, 1985 to February 16, 1993. A review of the notes indicates that, over a period of approximately seven years, respondent assured Mr. Guritzky that, although the matter against the Mustos was proceeding, it had been repeatedly delayed for a number of stated reasons. During this time, Mr. Guritzky never received a copy of the foreclosure complaint from respondent, despite at least one request therefor.

Although the record does not reveal what, if anything, respondent did for Mr. Guritzky, it is clear that the matter was never completed and that Mr. Guritzky never received reimbursement from the Mustos for their share of the debt to Midland. In February 1993, respondent allegedly informed Mr. Guritzky that there was nothing further that he could do for him.

Respondent claimed that he had taken several steps in Mr. Guritzky's behalf, such as sending a certification to Mr. Guritzky for his signature, which Mr. Guritzky never returned to him. Respondent did not follow up on the return of the certification. Respondent also contended that he had sent two writs of execution to the appropriate office in Trenton and that they had been returned to him for an unknown reason. Respondent also explained that the \$450 Mr. Guritzky forwarded was for advertising fees in connection with the sheriff's sale of the Mustos' property and that he had sent it to the sheriff's office. Although the record does not reveal if the sheriff's sale took place, it is clear that the \$450 was never returned to Mr. Guritzky. It was respondent's belief that a judgment remains docketed against the Mustos. He admitted, however, that he never recorded the assignment of Midland's rights to Mr. Guritzky.

Respondent testified that, from 1989 to January 1993, he experienced marital problems that "consumed virtually all of [his] energies" (T6/28/94 80). He also explained that, prior to that time, his office had been in his house and his wife had served as his secretary. Respondent left his house in 1989 or 1990 and, as

a result of a restraining order, was unable to return to it to get his clients' files, including Mr. Guritzky's. Respondent did not file a motion with the family court seeking the return of his files. In January 1994, when he ultimately obtained his files, he learned that many documents had been destroyed due to water damage.

Respondent did not deny that Mr. Guritzky had made a series of telephone calls to him. He stated that he had explained the delay to Mr. Guritzky with the information he had available to him. Respondent denied that he had ever intentionally misrepresented the status of the case to Mr. Guritzky. Respondent contended that he had done whatever work he had reported to Mr. Guritzky, although he had no documentation to prove it. Respondent apparently took no steps to try to obtain copies of documents before the DEC hearing, either to assist Mr. Guritzky in pursuing his claim against the Mustos or to evidence work undertaken in Mr. Guritzky's behalf.

Respondent did not give Mr. Guritzky a retainer agreement. Respondent maintained that a document submitted as part of the bankruptcy petition and designating him as Mr. Guritzky's attorney "effectively constitute[d], at least for purposes of bankruptcy, a retainer agreement" (T6/28/94 90).

By letter dated June 28, 1993, the DEC investigator requested that respondent reply to the allegations in Mr. Guritzky's grievance. No reply was forthcoming. Respondent did, however, file an answer to the formal complaint.

* * *

The DEC determined that, "in failing to pursue the litigation against the Mustos after receipt of the Assignment of the Midland chose-in-action and in failing to communicate with his client about the true status of the above matter," respondent violated RPC 1.3, RPC 1.4(a), RPC 3.2 and RPC 8.4(c). The DEC also stated that, over a period of approximately seven years, respondent

continued to neglect his client's litigation despite constant reminders the litigation was being neglected which came to the Respondent in the form of inquiries about the status of the suit from the client. The Panel further notes that Respondent was obviously aware of what needed to be done to pursue the case from the fact that he communicated to the client those steps he was allegedly (but not actually) taking to prosecute the litigation.

[Hearing panel report at 8]

The DEC, thus, found that respondent had violated RPC 1.1(a). The DEC also found that respondent violated RPC 1.5(b), by failing to communicate in writing the basis or rate of his fee. Lastly, the DEC also found a violation of R.1:20-3(f), based upon respondent's failure to reply to the grievance or cooperate with the DEC investigator's requests for information.

* * *

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 Board agrees with each of the findings made by the DEC, but finds that respondent's failure to cooperate with the DEC is more appropriately a violation of RPC 8.1(b), rather than R.1:20-3(f).

As the DEC pointed out, respondent knew what needed to be done in this case and, for some unexplained reason, failed to follow through on the matter. There is no question that respondent grossly neglected his client's case. There is also no question that, over a period of seven years, Mr. Guritzky was led to believe that respondent was actively pursuing his case when that, in fact, was not the case. It is unlikely that, at this late hour, Mr. Guritzky will be able to recover the contribution sought from the Mustos.

Respondent testified about the difficulties he endured as a result of his divorce. While the Board is sympathetic to respondent's personal problems, they do not serve to mitigate his ethics offenses in this matter for several reasons: (1) respondent's misconduct began before the onset of his marital problems; (2) as noted above, respondent made no attempt through the court to obtain his files from his ex-wife and (3) respondent should have been honest with Mr. Guritzky and, if necessary, withdrawn from the representation.

As noted above, respondent was suspended in October 1994 for three months for misconduct arising in 1991 and 1992. The misconduct in this matter took place in 1985 through 1993. Based on the overlap in the time periods, it cannot be said that this is a case where an attorney has not learned from a prior mistake. Thus, a six-member majority of the Board deemed a reprimand sufficient discipline for respondent's infractions. See, i.e., In re Girdler, 135 N.J. 465 (1994) (public reprimand where an attorney was guilty

of lack of diligence, failure to communicate and failure to provide a written retainer in a personal injury case; the attorney allowed a complaint to be dismissed on two occasions for failure to prosecute and failed to so inform his clients; he had been previously privately reprimanded). Two members disagreed with the majority and would impose a six-month suspension. One member did not participate.

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

Dated: _____

11/14/85

By: _____



Lee M. Hymmerling
Chair
Disciplinary Review Board