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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-331

IN THE MATTER OF

JAMES R. PICCIANO

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: October 26, 1995

Decided: February 26, 1996

Raymond E. Milavsky appeared on behalf of the District IV Ethics Committee.

Harvey M. Mitnick appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

These matters are before the Board based on a recommendation for discipline filed by the District IV Ethics Committee ("DEC"). The formal complaints, consolidated for hearing, collectively charged respondent with violations of RPC 1.1(a) and (b) (gross neglect and pattern of neglect); RPC 1.3 (lack of diligence); RPC 1.4 (failure to keep client informed and to comply with reasonable requests for information); RPC 1.5(b) (failure to reduce the basis of the fee to writing); 8.1(b) (failure to cooperate with the disciplinary authorities); RPC 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or

fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1972. He has no prior ethics history.

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Respondent was charged with misconduct in two separate matters:

The Schina Matter (District Docket No. IV-93-003E)

In or about April or May 1992, respondent was retained by Dominic Schina ("grievant") to defend him in a lawsuit seeking to recover possession of three mares left on grievant's farm for breeding with grievant's stallion. Respondent required and accepted a $2,500 retainer to represent grievant, which was paid in installments by a mutual acquaintance of grievant and respondent. In fact, that acquaintance had implored respondent to take on grievant's representation. Respondent had been reluctant to do so because grievant consulted him only one day prior to the scheduled return date of an order to show cause filed by the plaintiffs.

In addition to defending grievant against the plaintiff's claim, respondent agreed to file a counterclaim in his behalf for outstanding boarding fees for the mares, totalling approximately $30,000.

At their initial meeting, grievant provided respondent with information that served as a valid affirmative defense to the complaint. Specifically, grievant maintained that he had become the valid owner of one of the horses and that, pursuant to relevant New Jersey statutes, he had properly sold the other two at an auction to satisfy the outstanding boarding bill owed by plaintiffs. Although respondent had never before represented grievant, neither the scope of his representation nor the basis for the calculation of his fee was ever reduced to writing. Indeed, grievant testified that he had assumed that the $2,500 retainer represented a flat fee for respondent's handling of the entire matter.

On May 21, 1992, respondent travelled to Bergen County and appeared with grievant before the Honorable Arthur J. Lesemann on the order to show cause seeking the immediate return of the mares. Judge Lesemann adjourned the return date essentially to allow respondent time to file responding papers. The return date on the order to show cause was subsequently adjourned on several occasions and was ultimately rescheduled for July 30, 1992. Although the ethics complaint alleged that respondent failed to advise grievant of this return date, respondent maintained that grievant was "well aware of the proceedings." Exhibit RS-4.

Respondent appeared before Judge Lesemann on the July 30 return date. At that time, the judge apparently allowed respondent until August 7 to produce the foal (birth) certificate for the horse that grievant claimed to own. Respondent failed to produce

that documentation. Grievant maintained that he had long before provided the foal certificate to respondent, while respondent asserted that grievant never provided it to him, despite his visit to grievant's farm for that specific purpose.

Because the documentation was never produced, Judge Lesemann entered an order requiring grievant to return the horse that remained in his possession and to provide plaintiffs with specific information regarding the whereabouts of the two horses he had earlier sold at an auction. Although the complaint alleged that respondent failed to notify grievant of the entry of that order, grievant testified that a message to that effect was left on his answering machine in September 1992. Presumably, respondent had left that message.

Not long before, on July 23, 1992, respondent filed an answer to the complaint. Respondent neither included any affirmative defenses nor a counterclaim for delinquent boarding fees for the horses, despite his agreement with grievant to do so. While respondent offered no explanation for his failure to raise any affirmative defenses, he claimed that he had intended to file a separate action for the delinquent boarding fees at a later date, in Burlington County, where he considered venue more properly laid. Although the record is not entirely clear, it appears that respondent either was not aware of the "entire controversy" rule at that time or that he was so aware but nevertheless intended to file suit in Burlington County, with the hope for a transfer in venue of the entire matter to that county. It appears that respondent did,

indeed, file a motion for a change in venue of plaintiff's complaint. However, respondent maintained that that motion was summarily denied by Judge Lesemann.

Respondent never filed the intended counterclaim in grievant's behalf in any county. No testimony was offered to explain that failure.

On August 18, 1992, plaintiffs' counsel served respondent with interrogatories to be answered by grievant. Respondent forwarded grievant the interrogatories, which grievant answered and returned to respondent in a timely fashion. Respondent failed to forward the answers to plaintiffs' counsel, despite counsel's letter reminding respondent that those answers were due within five days. Respondent testified that he failed to supply those answers to counsel because his office was "in a bit of disarray" due to a heart attack suffered by the CEO of an insurance agency to which respondent was counsel. T211.[1]

In or about late September 1992, respondent received notice of a mandatory mediation of grievant's matter, scheduled for November 10, 1992. Respondent neither appeared at that mediation nor notified grievant that he, too, would be required to attend. Respondent testified that, at some point very proximate in time to the scheduled mediation, the CEO of the insurance agency to which he served as counsel suffered a heart attack. For some reason, on the morning of the scheduled mediation, respondent was summoned to the hospital where that CEO had been brought. Therefore,

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[1] "T" denotes the DEC hearing transcript of May 22, 1995.

respondent testified, he telephoned the court from the hospital and told the clerk that he would be unable to attend the mediation later that morning. (Respondent had previously requested an adjournment of the mediation on other grounds, which request was never addressed by the court). In any event, the clerk advised respondent that the mediation would proceed without his participation. On that same day, the court entered an order striking grievant's answer for failure to appear at the mandatory mediation. Respondent, admittedly, never advised grievant of that action.

Subsequently, on or about November 19, 1992, plaintiffs' counsel filed a motion to strike defendant's answer for failure to provide answers to interrogatories. He explained that he filed this motion at a time when the defendant's answer had already been suppressed because he believed that respondent would successfully move for relief from the first suppression order. On or about December 18, 1992, the court entered an order striking grievant's answer, after respondent failed to object or to supply answers to interrogatories. Respondent, concededly, did not inform grievant of this action.

At some point shortly thereafter, respondent received notice of a pretrial conference of grievant's matter, scheduled for January 13, 1993. Respondent neither notified his client of the conference nor appeared at the conference. Respondent offered no specific testimony to explain his failure to appear at that conference. However, he apparently believed that his appearance

was meaningless, given the status of his client's answer. See T212.

On or about January 22, 1993, the court entered an order suppressing grievant's answer for a third time, as a result of respondent's failure to appear at the pretrial conference, entering a default against grievant and setting a date for a proof hearing (February 25, 1993). Respondent admitted that he did not inform grievant of this action.

Grievant testified that he had not heard from respondent since late August or early September 1992, despite several attempts to reach him. At one point, grievant became so frustrated that he began to request respondent's secretary to return his call, simply to confirm that respondent had received his several messages. Having been unsuccessful in his own efforts to contact respondent, on or about February 8, 1993 grievant wrote to Judge Lesemann in an attempt to learn the status of his case. Sometime thereafter, in February 1993, grievant finally spoke with respondent. At that time, respondent told grievant that he was "getting ready to go to trial." T173.

Grievant subsequently retained the services of another attorney, who assumed responsibility for the matter. That attorney was ultimately successful in vacating all three orders suppressing the answer as well as the entry of default. The matter was eventually tried in the Chancery Division, with a judgment partially entered in grievant's favor. Grievant testified,

however, that he expended an additional $10,000 in both attorney fees and costs to reinstate his answer.

Respondent essentially admitted that he had not contacted grievant, at least from November 1992. While he denied misrepresenting to grievant that he was ready to go to trial in the matter, he admitted that he did not specifically advise him of the status of his answer. That was so, he testified, because he had intended to file all the appropriate motions in order to reinstate the answer at his earliest opportunity and that he was "hoping to have the matter reinstated before he (grievant) had to know it was stricken." T227. However, respondent went on, just as he was about to prepare the necessary motions to "get the case back on track," he received a telephone call from grievant's new attorney, advising him that grievant had retained her to assume the defense of his matter. T213-214. Respondent was elated by that information because of the amount of work he would avoid in order to reinstate the complaint. He, therefore, immediately delivered grievant's file to him.

Following his discharge of respondent, grievant apparently filed for fee arbitration, seeking a refund of his retainer. The fee arbitration committee ordered respondent to return $1,750 of the retainer paid to him. However, respondent subsequently filed for bankruptcy, listing grievant as a creditor.

Respondent was also charged with a failure to cooperate with the DEC investigator in this matter. While respondent filed a reply to the grievance, as well as an answer to the complaint and

an amended answer once he retained counsel, he failed to comply with the DEC investigator's request to meet with him to review both grievances in order to conduct a proper investigation. See Exhibit U-31. Respondent testified that he had become confused by the materials he had received in both matters and, further, that he had not read the last paragraph of the DEC investigator's letter to him of April 27, 1994, which requested that respondent contact him to arrange for a meeting. The investigator's initial request for respondent's input was made on March 22, 1994. It was not until August 18, 1994, when respondent filed his initial answer, that respondent made any contact with the DEC investigator.

The DEC found respondent guilty of violation of all of the RPCs charged (1.1; 1.3; 1.4, 1.5 and 8.1). The DEC recommended that respondent be reprimanded for his misconduct.

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The Ulicny Matter (District Docket No.IV-94-015E)

On or about February 7, 1989, respondent was retained by Ronald Ulicny ("grievant") to defend him in a civil action filed by William Church, Jr. for breach of contract. Grievant had earlier entered into a stock purchase agreement with Church for the acquisition/purchase of a corporation (Standard American Cleaning Company, Inc.) owned and operated by Church. The purchase price of the corporation was $200,000. Respondent required and grievant

paid a retainer in the amount of $1,500. Although respondent had never before represented grievant, he did not reduce the terms of his representation to writing. Grievant testified that he understood respondent's hourly rate to be $110 and that respondent promised to send him monthly fee statements until the initial retainer was exhausted, at which point a supplementary retainer would become due. Respondent, on the other hand, was not even able to tell the DEC his hourly rate at that point in time.

Grievant testified that, during their initial meeting, respondent agreed not only to defend him against plaintiff's claim, but also to assert affirmative defenses to the claim and to file a counterclaim for rescission and for damages grievant allegedly sustained as a result of plaintiff's fraud. For example, grievant alleged that plaintiff had misrepresented the tax liability status of the corporation. Apparently, at the time of transfer, the corporation was delinquent in taxes in the amount of $66,000. Although the purchase agreement protected grievant from tax liability as between himself and the plaintiff, the IRS was not a party to that agreement and, naturally, looked to the present owner of the corporation for satisfaction of the liability. Grievant alleged that his payments to the IRS of the corporation's delinquent taxes detrimentally affected his ability to pay salaries, suppliers and to conduct the day-to-day operations of the corporation. He ultimately lost the business to foreclosure, apparently by a secured creditor.

On or about April 19, 1989, respondent filed an answer to the complaint. The answer consisted of a general denial and did not include any affirmative defenses or a counterclaim. On or about April 18, 1989, plaintiff's counsel served respondent with interrogatories and a notice for production of documents.

Respondent did not forward those interrogatories to grievant until June 14, 1989 — almost two months later. Grievant, nevertheless, promptly completed answers to interrogatories and returned them to respondent within four or five days of his receipt of them. Respondent did not provide those answers to plaintiff's counsel, as a result of which plaintiff's counsel filed a motion to strike the defendant's answer. Respondent did not oppose that motion. However, prior to its return date, on or about August 10, 1989, respondent furnished the interrogatory answers to plaintiff's counsel, who withdrew his motion but requested more specific answers to interrogatories, by letter dated August 15, 1989.

While the record is not entirely clear, it appears that respondent did not notify grievant of the need for more specific interrogatory answers until January 12, 1990. See T119. (There is some indication that respondent may have requested such information from his client in October 1989, although, again, that is not entirely clear). Respondent explained his delay by speculating that he might have believed that he would be able to supply the requested information from his file. That notwithstanding, grievant answered the more specific requests to the best of his ability and returned them to respondent on or about January 15,

1990, along with a letter essentially pleading for a status on the matter. The letter further advised respondent that some of the information requested was simply not accessible to grievant because the creditor who had foreclosed on the business had apparently padlocked the doors to the company and would not cooperate with grievant's efforts to obtain the needed information. However, grievant gave respondent the names of individuals who might be able to provide at least some of the requested information.

Grievant testified that, prior to and until that point, respondent had forwarded no monthly statements for services, as previously agreed, and had not answered any of his several telephone calls seeking information about the case. He had telephoned respondent at least once or twice a month for that purpose, between June 1989 and January 1990.

Respondent did not supply more specific answers to interrogatories to plaintiff's counsel. In the interim, counsel filed a motion to compel more specific answers. Respondent neither opposed that motion nor gave counsel more specific answers. An order requiring more specific answers was entered on October 18, 1989. For reasons unexplained, respondent did nothing to attempt to comply with the court's order. Thereafter, counsel filed yet another motion to strike defendant's answer, which motion was granted on January 19, 1990. Again, respondent neither opposed that motion nor gave counsel the more specific information he had received from his client, albeit still somewhat incomplete.

Grievant contended that respondent never notified him of any pending motions to strike his answer, a fact admitted by respondent. Respondent maintained that he had not done so because he was hopeful that grievant would supply him with more specific information. In any event, it is clear that respondent made no subsequent attempts to provide plaintiff's counsel with more specific answers or to make a motion to reinstate defendant's answer. That notwithstanding, on January 17, 1990, two days prior to the entry of the order striking grievant's answer, respondent attempted to file an amended answer and counterclaim in grievant's behalf without leave of court. Although respondent stipulated that his action was improper, he maintained in his answer that his intent was to "give [his] client certain leverage in negotiations." Exhibit R-1. At the DEC hearing, however, respondent testified, somewhat inconsistently, that he had not become aware of any allegation of fraud on Church's part (to form the basis of a counterclaim) until well into the representation. When asked what motivated him to file the counterclaim several months later, respondent answered, "probably, when I reviewed the file, I realized that a counterclaim was not initially filed, and that's probably my attempt to correct the oversight." (Emphasis supplied). T115-116. While it is not clear how this came about procedurally, the counterclaim was not allowed.

Thereafter, on or about May 3, 1990, plaintiff's counsel filed a request for entry of default, inasmuch as there had been no attempt to reinstate the answer. Subsequently, on May 18, 1990,

the clerk entered a judgment by default against grievant in the amount of $243,283.14. Grievant testified that respondent never notified him of the entry of the judgment against him. In fact, it was not until November 1991, when grievant and his wife attempted to refinance their mortgage, that he learned for the first time of the substantial judgment entered against him.

Respondent admitted that he had not disclosed to grievant that his answer had been stricken and that he had not been as diligent as he could or should have been. Moreover, respondent could neither produce any proof nor say with certainty that he had advised grievant of the entry of the $243,000 judgment against him. Respondent was sure only that he had discussed with grievant the possibility of filing for bankruptcy in the event of a judgment. He could not recall when that conversation occurred and kept no written record of any such conversation. Grievant remotely recalled that respondent, at some point, had suggested that grievant transfer title to grievant's home to his wife, presumably as a precaution in the face of pending litigation. Given respondent's admission that he probably did not communicate with grievant between August 1989 and January 1990, given his inability to approximate the date of his conversation with grievant about the possibility of filing for bankruptcy, and given grievant's testimony that he never spoke with respondent even after January 1990, it seems likely that such a conversation, if it indeed occurred, took place early on in respondent's representation — long before entry of a judgment became a likely outcome.

Respondent maintained, and plaintiff's attorney confirmed, that either shortly before or shortly after the entry of a judgment by default, respondent spoke with plaintiff's counsel, who advised him that he was aware that grievant had no money to satisfy such a large judgment and that it was not his client's intention to execute on any such judgment. Rather, he told respondent, his client needed the record of an uncollectible judgment for tax purposes. Plaintiff's counsel testified that respondent advised him that any attempt to execute on the judgment would only result in an immediate petition for bankruptcy on grievant's part.

After grievant learned of the entry of the judgment against him, he unsuccessfully stepped up his efforts to contact respondent. Grievant also enlisted the aid of the attorney who represented him on the purchase of the corporation to elicit some kind of reply from respondent, which included at least one request for an accounting and/or for the return of the retainer grievant had paid respondent. Respondent, admittedly, did not reply to respondent's requests. He believed that his services had exceeded the amount of the retainer, that he had done his job and that the case was finished. T103.

Grievant was ultimately forced to retain the services of yet another attorney to attempt to set aside the judgment. He hired Ed Jonas in November 1993 for that purpose. At some point shortly after he was retained, Jonas contacted respondent to obtain the name of his malpractice carrier. Respondent advised Jonas that he carried no malpractice insurance. Jonas, therefore, decided to

attempt to make a motion to set aside the entry of judgment by default. However, he enlisted respondent's aid by assigning respondent the task of obtaining Church's address so that he could send him a copy of the motion. Respondent obtained the number of Church's father and telephoned him. The ethics complaint alleged that respondent misrepresented that he was Jonas, a friend of Church, in order to obtain the address. This alleged misrepresentation was the basis for the charges in the complaint of violations of RPC 8.4(b) and (c).

While respondent admitted that he probably gave Church, Sr. a fictitious name, he steadfastly denied that he had used Jonas' name. He speculated that Church, Sr. automatically assumed that the caller had given the name Jonas, when he received a copy of the motion from Jonas several days or so later (respondent had given Jonas the address immediately following his conversation with Church, Sr.).

Jonas' motion was unsuccessful and the judgment stood. Grievant subsequently filed a petition for bankruptcy, which was granted. However, the IRS liability was not discharged by that bankruptcy status. Moreover, grievant testified, had he been successful on a counterclaim for rescission, he would not have been forced to file for personal bankruptcy and Church would have been legally responsible to the IRS. Furthermore, grievant was forced to retain two attorneys to meet the problems caused by respondent's conduct: one to attempt to set aside the judgment (Jonas) and another to handle the bankruptcy action. Finally, grievant

testified, the outstanding judgment against him made refinancing his mortgage difficult.

Indeed, although Church never made any attempt to execute on the judgment, even his attorney testified that grievant undoubtedly suffered economic consequences at respondent's hands. For example, he testified, grievant could have benefitted by his offer to respondent, at some point, to enter into a consent judgment that deducted the amount of the tax liability. It is not clear whether that would have provided grievant with any relief on a practical basis (he would still be liable to the IRS as the sole shareholder of the corporation). Moreover, Church's attorney testified that respondent's conduct deprived grievant of the opportunity to litigate not only the affirmative defenses he had available to him but also the counterclaim for rescission on the basis of his client's alleged fraud, which certainly could have resulted in the recovery of punitive damages, in addition to rescission.

Besides the substantive charges, respondent was charged with a lack of cooperation with the DEC for essentially the same reasons previously set forth in the Schina matter. His explanation on this score was virtually identical.

* * *

The DEC found that respondent had violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and RPC 1.5(b). The DEC also found that respondent had failed to reply to the DEC secretary's initial

requests for a reply to the grievance, failed to respond to several telephone calls placed by the DEC investigator and engaged in a "general lack of responsiveness" to the DEC. Hearing panel report at 6.

The DEC did not address the issue of whether respondent's use of a fictitious name to Church, Sr. constituted a violation of RPC 8.4(b) and (d). The DEC recommended that respondent receive a reprimand for his misconduct.

* * *

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 clearly and convincingly supported by the evidence. In the Schina matter, respondent completely mishandled his client's case to the point of gross neglect and then proceeded to ignore his client's repeated requests for information, all in violation of RPC 1.1(a), RPC 1.3 and RPC 1.4 and all to the substantial detriment of his client, who was then required to spend substantial sums of money to remedy the consequences of respondent's misconduct. In addition, respondent failed to reduce the basis of his fee to writing, in violation of RPC 1.5(b), and clearly misrepresented to his client the status of his matter, in violation of RPC 8.4(c). Although a violation of that RPC was not specifically charged, it was both factually raised by the complaint and fully litigated during the DEC hearing.

The Board, however, cannot agree that the record clearly and convincingly supported a finding that respondent failed to cooperate with the disciplinary authorities, in violation of RPC 8.1(b) and, therefore, determined to dismiss that charge.

Respondent's conduct in the Ulicny matter, was troubling, particularly because he did nothing meaningful to avoid or correct the rather severe consequences of his misconduct. Grievant had a $250,000 judgment entered against him solely as a result of respondent's complete and gross neglect of his matter. Respondent did not even have the decency to advise his client of the entry of the judgment against him or to comply with his client's subsequent and somewhat frantic requests for information. One can only imagine grievant's shock and embarrassment upon discovering the entry of a substantial judgment against him — purely by accident and particularly during the course of filing an application for refinancing. Respondent's misconduct had dire and irremediable consequences. Not only was grievant forced to expend substantial sums in the form of legal fees to attempt to remedy the consequences of respondent's misconduct, but he was also forced to file for personal bankruptcy. Moreover, despite his discharge in bankruptcy, grievant was still liable to the IRS for delinquent taxes for which Church's attorney had been willing to give a credit, in the event of a consent judgment. In addition, even Church's attorney seemed to suggest that grievant might have been successful on an overall counterclaim for rescission and punitive damages. The fact that respondent may have believed that Church

would not execute on the judgment did not relieve him of his responsibility to his client or mitigate his misconduct. Church was in no way obligated to refrain from executing on the judgment just because his attorney had represented that that was not his ultimate intention. Respondent did nothing to ensure that Church kept his word, such as attempting to have him sign a warrant to satisfy judgment after he received the benefit of his tax treatment of the judgment. Indeed, at the very least, respondent should have clearly advised grievant in writing of the potential danger of the entry of a judgment and then should have done everything reasonably necessary to avoid that event. Respondent did not even offer to file the bankruptcy petition for grievant or to reimburse him for his attorney's fees in connection with that action.

The issue of discipline remains. Misconduct that has included a combination of one instance of gross neglect, pattern of neglect, failure to communicate and failure to cooperate with the disciplinary authorities has frequently resulted in a reprimand. In some cases, two or three of these violations are present, either alone or coupled with a different violation, such as misrepresentation, as in this matter. For example, in In re Wall, ____ N.J. _____ (1990) (no citation), an attorney was publicly reprimanded for lack of diligence and failure to communicate in two matters, gross neglect in one matter and, finally, improper sharing of a legal fee with a non-attorney. See also In re Lester, 116 N.J. 774 (1990) (attorney publicly reprimanded for gross neglect in

two matters and for providing untimely and uncandid answers to ethics grievances.

Although more serious discipline has resulted in matters involving combinations of two or more instances of neglect, lack of diligence, pattern of neglect, failure to communicate in two cases and misrepresentation of the status of the case in one matter, those cases have generally involved an additional finding of lack of cooperation with the disciplinary authorities, as well as consideration of aggravating factors, such as a prior disciplinary history. See, e.g., In re Marlowe, 121 N.J. 235 (1990) (attorney suspended for three months).

It is true that the consequences of respondent's misconduct were serious. However, respondent readily admitted his wrongdoing and expressed contrition for his misconduct and its attendant consequences. Moreover, until these incidents, respondent practiced for twenty-four years without once being the subject of discipline. Under a totality of the circumstances, therefore, a four-member majority of the Board has determined to reprimand respondent and to require him to practice under the supervision of a proctor for a period of one year. Three members voted to impose a three-month suspension, based on the severity of consequences of respondent's misconduct. Two members did not participate.

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

Dated: 2/26/96

Lee M. Hymerling
CHAIR
DISCIPLINARY REVIEW BOARD