SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 96-175

IN THE MATTER OF :
:
JAY M. GROSSMAN, :
:
AN ATTORNEY AT LAW :

Decision

Argued: July 17, 1996

Decided: September 18, 1996

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Howard A. Miller appeared on behalf of respondent.

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee (DEC). The complaint charged respondent with misconduct in four matters. For the sake of organization, the specific allegations appear after the recitation of facts of each matter.

Although respondent's testimony appears to contest some of the allegations in the complaint, at the commencement of the hearing respondent's counsel informed the DEC that respondent admitted the charges.

At the beginning of the hearing, the DEC allowed the presenter to amend the complaint to include a violation of RPC 1.16(d) (abandonment of clients).

This matter was heard by a five-member panel. The hearing panel report contains the decision of the majority of the panel. The minority position is not reported.

Respondent was admitted to the practice of law in New Jersey in 1986. During the time relevant to the within allegations, he was employed by the law firm of Fast and Fast, with offices in Livingston, Essex County.

Respondent was suspended from the practice of law for three years, by Order dated November 7, 1994, for signing a judge's name to a divorce judgment and giving it to his client to cover up the fact that he had mishandled the case. Respondent ultimately disappeared and abandoned approximately 200 cases, after he misrepresented to courts and clients alike that the cases had been settled. In re Grossman, 138 N.J. 91 (1994).

The facts in the four matters now before the Board are as follows:

The Christel Matter

In May 1994, respondent undertook the representation of Gregory Christel in connection with a claim for real estate commissions. Although respondent took some action in this matter, he failed to file a complaint in Christel's behalf. The ethics allegations herein arose from respondent's serious misrepresentations in connection with that case.

During the course of the representation, respondent made a number of oral representations to Christel and to respondent's employer, Thomas Fast, Esq., about the status of Christel's matter. Specifically, respondent stated that he had filed a complaint and that the matter was progressing apace. On undisclosed dates,

respondent gave Christel a copy of a complaint, dated July 12, 1994, a copy of a certification for default against the defendants and a copy of a cover letter to the Morris County clerk, both dated September 27, 1994, forwarding the certification. Respondent gave the documents to Christel to deceive him into believing that he had filed the complaint and that a request for default had been filed.

On October 19, 1994, respondent did not report for work. He failed to communicate with his office about his whereabouts or client matters he had been handling. Subsequent to respondent's disappearance, Fast learned that respondent had not filed suit in the Christel matter. Another associate in Fast and Fast was assigned to handle the matter.

In explaining his behavior, respondent referred to his then-pending earlier ethics matter and stated that at the time he knew he "would no longer be a licensed attorney in a relatively short period of time. And the nature of this was basically holding this client at bay waiting for the end of [his] legal career." Respondent claimed that Christel would not be harmed because the pleadings were ready to be filed, the statute of limitations had not run and another attorney could have pursued the matter.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate) and RPC 8.4(c) (conduct involving fraud, dishonesty, deceit or misrepresentation). In his answer, respondent admitted that he had

violated RPC 1.4(a) and RPC 8.4(c). The DEC determined that respondent had violated RPC 1.3, RPC 1.4(a) and RPC 8.4(c).

The Yam Matter

In late August 1994, respondent was assigned the representation of Johnny Yam in his purchase of real estate. Yam had been represented by Fast. Because, however, Fast was going on vacation, respondent would be handling the matter during Fast's absence. It was clear to the DEC that Fast "had the prior and primary contact with the client, negotiations, preparation and review of documents, etc." When Fast returned, respondent, who had had several conversations with Yam and had become acquainted with the file, remained as the attorney responsible for the case.

The Yam contract was dated August 22, 1994 and provided for a closing on September 30, 1994. Fast had been negotiating a use and occupancy agreement with the seller's attorney. Respondent negotiated an extension of the closing date to October 10, 1994, with a penalty of $100 per day imposed if title did not close by that date. Yam was pursuing the mortgage application on his own. Respondent testified that he had a number of conversations with Yam about the application and that Yam was aware of the potential penalties if the closing did not take place on time.

According to respondent, "the preliminaries," including title work and the survey, had not been ordered because of the outstanding issue of Yam's financing and the penalty clause in the use and occupancy agreement. With Yam's consent, however,

respondent ordered the title work. The title commitment was received on or about September 21, 1994. The mortgage commitment, dated October 12, 1994, was "faxed" to respondent on that date. As noted above, several days later, on October 19, 1994, respondent vanished. At the DEC hearing, respondent was unable to explain why he had not forwarded the documentation to the lender between the time it was received, October 12, and his disappearance, October 19.

Respondent contended that he had an oral understanding with the attorney for the seller that the deadline for the closing had been extended further to the tenth business day of the month – as opposed to the tenth day of the month – and that, if the closing were to occur one or two days later, the seller would not have enforced the penalties. Respondent testified that he so informed Yam. Respondent did not recall if he notified Fast. Respondent failed to memorialize that agreement. Respondent stated that, had he been present at the time of the closing, the seller's attorney would have honored their oral agreement. (There is no confirmation in the record that there was such an agreement).

With regard to his abandonment of Yam, respondent stated that the matter "was pretty much ready to go and that any attorney with any real estate experience could step into that file and close it right away."

Fast testified that he examined the file after respondent's disappearance. Several steps still needed to be taken for the closing. Fast testified that he spoke to Yam, who thought that the

penalties had been waived or that the time had been extended. The seller, however, did not agree to waive the penalty. The closing in the Yam matter took place on October 27, 1994, causing Yam to incur $1,700 in penalties (17 days x $100). Fast paid the penalties.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) and (b) and RPC 1.3.

The DEC did not find respondent guilty of unethical conduct in this matter, seemingly blaming the situation on Fast:

> The majority of the Panel concludes that the charges against the Respondent in the Yam matter have not been proven by clear and convincing evidence, especially in light of Mr. Fast's desire to go on vacation; his transfer of this file to the Respondent; his failure to give the Respondent any direction with respect to the file; the title commitment was not issued until September 21, 1994; the mortgage commitment was not issued until approximately October 12, 1994.
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> * * *
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> The Respondent testified that he joined the Fast & Fast firm in 1994 and was expected to spend two days per week working on title agency matters. For his work with the law firm, he was to receive a percentage of the legal fees generated. There is no evidence that Mr. Fast made any serious attempt to determine the Respondent's prior experience in real estate matters. Indeed, had Mr. Fast made any attempt to verify the Respondent's experience, he would have determined that the Respondent was not suited for his practice/title agency. Although the Respondent was assigned this file in August, 1994, there appears to be no attempt on the part of Mr. Fast to, in any way, supervise the Respondent. Indeed, it appears as though Mr. Fast had no interest in what the Respondent was doing. Mr. Fast made no attempt to review the six to ten files assigned to the Respondent and took a *laissez faire* attitude. It is not clear from the evidence produced how the matter was going to close on or before October 10, 1994 when, in fact, the mortgage commitment was dated October 12, 1994. There was no evidence

> produced that the mortgage application process was the responsibility of the Respondent and, indeed, the testimony is to the contrary (i.e. the client was attending to the mortgage application personally). Assuming that all of the title, survey and other work was concluded on October 12, 1994, the necessary 5-7 business days needed by the lender's review attorney would not have avoided the imposition of the $100 per day penalty. Under the circumstances, the majority of the Panel is not convinced, by clear and convincing evidence, that there was a lack of due diligence on the part of Respondent. Indeed, the majority of the Panel questions Mr. Fast's supervision of the Respondent (RPC 5.1).

The Brandt Matter

In late spring or summer 1994, Sheldon Fast, Esq., Thomas Fast's father and of counsel to the firm, approached respondent about a matter involving Joseph Brandt. (In a letter to the Board, Sheldon Fast stated that he had retired on February 1, 1993. He was, however, listed as of counsel on the firm's letterhead in the spring of 1994. See complaint, Exhibit A). A relative of Brandt had contacted Sheldon Fast about having a guardian appointed for Brandt. Respondent had never handled a guardianship matter and did not know how to proceed. He so informed Sheldon Fast. Respondent did not exactly recall Sheldon Fast's reply but thought that he had said that "no one else in the office knew how to handle one either." Respondent believed that he had also told Brandt's nephew that he did not know how to proceed. Respondent testified that he consulted the applicable statutes and may have looked at the pertinent rules. He remembered asking another attorney in his office for assistance, who suggested that he also look at the

"practice series." Respondent did not recall doing so. It is unclear if respondent asked Thomas Fast for help.

Both Thomas and Sheldon Fast asked respondent about the progress of the matter. Respondent told Thomas Fast that he was trying to "brush up" on guardianship procedures. That was not true. As to Sheldon Fast, respondent asserted that he knew that respondent had not taken any substantive steps in the matter.

* * *

Brandt was in the hospital and the hospital staff was unwilling to release him to his own residence. Respondent was successful in having Brandt admitted to a nursing home within four-to-five days after his contact with Brandt's nephew. According to respondent, he spoke with an individual at the nursing home who agreed not to pursue payment until Brandt's guardian had been appointed. Bills from the hospital and the nursing home were sent to respondent.

Respondent, however, took no action to have a guardian appointed for Brandt. As noted above, respondent failed to appear for work on October 19, 1994. At some time thereafter, bills from the nursing home and the hospital were discovered in respondent's file. Although unclear, there is reference in the record to a threatened eviction proceeding against Brandt from the nursing home because his bills had not been paid. (This issue was not fully explored and no finding can be made based on this information).

With regard to his abandonment of Brandt, respondent stated that

> everybody was satisfied with the state of affairs as they were. And everybody understood that this matter was going to take some time. So that it would go along in its course. Whether I was there [or] some other attorney was there it would go along in its course and it would be handled.
>
> [Exhibit P-8 at 65-66]

After respondent left Fast and Fast, a new associate who had never done a guardianship proceeding completed the matter in Brandt's behalf. The associate testified before the DEC and explained that he ascertained how to proceed by consulting the court rules, a state office and obtaining a subject manual from the Institute for Continuing Legal Education.

Brandt's niece became his guardian. Respondent noted that no one had agreed to become Brandt's guardian when he was pursuing the matter. The record does not reveal if this factor contributed to respondent's failure to move the matter forward.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) and (b) and RPC 1.3.

The DEC determined that respondent was not guilty of the allegations contained in the complaint. The DEC concluded instead that, "as a result of the Respondent's attempt to solicit advice from Sheldon Fast, Esq. as to the manner and handling of the guardianship manner [sic], the employer owed the Respondent the duty to supervise the work in order to make sure that the client was well served (RPC 5.1)."

The Giamanco Matter

In July 1994, respondent was assigned the representation of George and Christina Giamanco in connection with their purchase of real estate. Respondent had previously handled real estate closings and felt competent to complete the matter. The closing took place on September 23, 1994. The mortgage was paid off on or about that date.

After the closing, however, respondent failed to disburse funds due to the title insurance company and the surveyor. Furthermore, respondent failed to record the deed and mortgage and see to it that judgments affecting title to the property were cleared. (Respondent testified that he thought that the title company would take care of clearing the judgments).

Fast learned about the status of the file on or about October 19, 1994, after respondent's disappearance. Fast took care of the recordation and payments on or about October 24, 1994. Fast testified that he may have been unaware that the judgments had not been cleared. On or about December 1, 1994, Fast sent a letter to the seller's attorney on that topic.

The closing took place late on a Friday afternoon. Respondent explained that his primary concern was getting the loan package and the mortgage payoff mailed. Respondent intended to complete the remaining items after the weekend. He did not, however. Respondent was unable to explain why he had not wrapped up the matter during the ensuing weeks between September 26, 1994 (the

Monday after the closing) and October 19, 1994, before he left the Fast firm.

* * *

The complaint charged respondent with a violation of RPC 1.1(a) and (b) and RPC 1.3.

The DEC found that respondent had not violated the charged RPCs. Rather, the DEC determined that, "because of Respondent's limited experience in real estate closings, the employer should have more closely supervised the Respondent, especially in view of the fact that the employer entrusted Respondent with signed but otherwise blank trust checks."[1]

The DEC noted that there was no evidence of harm to the Giamancos or Fast as a result of respondent's derelictions.

* * *

Respondent was asked during the hearing why he had vanished:

> It was the specific incident that occasioned it. That was -- it was on that day that the letter brief of, I think it was Mr. Sweeney [of the Office of Attorney Ethics] to the Supreme Court in the prior Ethics matter was received at my home and my parents who, at that point, were not aware of the extent of what was going on with the Ethics matter, were suddenly made aware in a very real way about what was going on.
>
> I could not -- I couldn't face them, and that was the specific incident that happened. It was at that point that I vanished.
>
> [T11/14/95 122]

* * *

In sum, the DEC found respondent guilty of a violation of RPC 1.3, RPC 1.4(a) and RPC 8.4(c) in the Christel matter. The DEC

[1] It was Fast and Fast's practice to give the closing attorney trust account checks signed in blank to take to the closing.

recommended the dismissal of the other three matters, Yam, Brandt and Giamanco. Accordingly, the DEC did not find respondent guilty of a pattern of neglect, as charged in the complaint. As noted above, the complaint was amended to include an allegation of violation of RPC 1.16(d). The DEC did not specifically refer to this violation in its report.

At the end of its report, the DEC again placed the blame for respondent's misconduct on Fast:

> After having had the opportunity of listening to the testimony of the Grievant/employer, Thomas Fast, Esq., as well as the testimony of the Respondent, the majority of the Panel concludes that Mr. Fast placed the Respondent in a 'no win' situation with respect to the Yam and Brandt matters (Count II of the complaint). The majority of the Panel concludes that Mr. Fast should have taken a more appropriate interest in the Respondent's experience before he was hired. The Respondent testified that prior to his employment with Fast & Fast, he had experience as an attorney doing Appellate pool work for the Office of the Public Defender; he worked for various collection law firms and had done some foreclosure work.
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> * * *
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> Respondent testified that he had handled approximately three residential refinances prior to joining the Fast firm.
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> The majority of the Panel concludes that if Mr. Fast had inquired of the Respondent's experience, it would have become clear to Mr. Fast that the Respondent was not suited to the type of practice for which he was hired.
>
> As a result, the majority of the Panel concludes that there is no clear and convincing evidence that the problems which existed in the Yam, Brandt and Giomanico [sic] matters resulted from the Respondent's unethical conduct. Indeed, Respondent's lack of prior experience, the failure of the employer to assist when asked and the employer's failure to supervise all contributed to the problems that developed in these three matters.

The DEC recommended that respondent's suspension continue until he can supply evidence "that his psychiatric/emotional condition warrants reinstatement."

* * *

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, however, disagrees in part with the conclusions of the DEC.

The firm of Fast and Fast has an affiliated title insurance agency. Respondent was employed to work two days a week in that office. The rest of his time was to be devoted to work he brought to the law firm or work assigned to him from the firm. The DEC spent a good deal of time at the hearing discussing this arrangement as well as the basis for respondent's compensation for his work. It appears that the DEC was asserting that respondent was hired to work in the title company and that his qualifications to work in a law office were not investigated and his work was not supervised. The Board disagrees with the DEC's condemnation of Fast and Fast. Although, arguably, respondent did not receive as much supervision as he might have, the four matters in question were not complex. Respondent's misconduct had nothing to do with his level of skill or supervision but, rather, with his basic abilities and understanding of his responsibilities.

The Board agrees with the DEC's findings in Christel. Respondent fabricated a complaint, certification and cover letter

to mislead his client into believing that a complaint had been filed and a default requested.

The Board cannot concur, however, with the DEC's dismissal of the balance of the ethics charges and finds that respondent did commit other acts of misconduct in the Yam, Brandt and Giamanco matters. Indeed, setting aside the abandonment issue for a moment, the DEC's recommendation that the remaining three matters should be dismissed is in error in all three instances. Taken one at a time, the DEC's determination in the Yam matter is incorrect. Yam was responsible for pursuing his mortgage commitment. It is not disputed that he had been aware of the potential monetary penalties if the closing did not take place by October 10, 1994. Respondent, however, could have ordered additional documents needed for the closing and, significantly, committed to writing his alleged oral agreement with the seller's attorney about when the penalty would start to accrue.

In Brandt, it is true that respondent was unaware of how to proceed in a guardianship matter and that no one in the Fast law firm was able to assist him. Respondent, however, could have done more. Other than assisting in having Brandt moved into a nursing home, he accomplished nothing. Respondent should have ascertained what steps needed to be taken from a review of the Rules Governing Civil Practice. If those rules were unclear or insufficient, respondent could have called the court or a number of state agencies for assistance.

In Giamanco, too, the Board is unable to agree with the DEC's determination. The DEC found that respondent was unable to handle a simple real estate closing, disregarding the fact that he had previously handled closings and clearly knew what needed to be done. It is clear that respondent knew that the deed and mortgage had to be recorded. It is also clear to the Board that he was aware that checks needed to be mailed to the title insurance company and to the surveyor to pay them for their services.

Respondent is guilty of a number of serious disciplinary infractions. He violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4 and RPC 8.4(c). Adding to the gravity of the situation is the fact that respondent has previously been disciplined for similar misconduct. As noted above, respondent received a three-year suspension by Order dated November 7, 1994. In that matter, he was found guilty of, among other things, forging a judgment of divorce in or about June 1989. Respondent's misconduct in Christel took place between approximately July and October 1994, prior to the Court's Order in the earlier matter, but after the Board's recommendation of March 1994. Respondent clearly knew that his behavior was unacceptable, but chose to repeat it.

Remaining to be discussed is respondent's abandonment of his clients, a violation of RPC 1.16(d). Respondent's behavior in this regard was inexcusable, particularly because he had exhibited the same conduct before. In or about October 1989, respondent disappeared, leaving his car, containing approximately 200 client files, at Kennedy Airport. This time, respondent vanished when he

received the OAE's brief in the earlier matter. Despite the fact that respondent was in the middle of a disciplinary proceeding for abandoning his clients, he repeated that type of behavior. The only possible conclusion is that respondent is incapable of practicing law, even when handling only a small number of cases, as he was here.[2] An attorney who abandons his clients should not be allowed to continue to practice law. See In re Clark, 134 N.J. 522 (1993).

The Board recognizes that respondent's actions were not taken for the purpose of self-enrichment. Rather, his misconduct was the alleged result of a personality disorder for which respondent voluntarily sought treatment. Respondent supplied a psychological report from his former therapist diagnosing his dysthymic disorder and avoidant personality disorder. Respondent is currently treating with Ira Sugerman, Ph.D., who also supplied a report attesting to respondent's difficulties and stated that respondent has made some progress. Respondent also stated that he is making progress in therapy. See T11/14/95 157-179.

The Board noted, however, that, on June 23, 1993, during his earlier disciplinary proceeding, respondent also made similar claims:

> I'm in counseling now. I've been in counseling for three and a half years, a weekly basis, and I have -- I can't represent to you now, I don't see how I could, that to a certainty, to 100% certainty, I understand all

[2] Fast testified that respondent had some involvement in six to ten matters during his employment at Fast and Fast. His concurrent responsibilities at Fast's title agency are not revealed in the record.

> the factors that went into this, they have all been overcome and they will never occur again. I can't do that. The best I can tell you is that I --.
>
> I'm confident that I understand what contributed to these things. It was basically my inability to deal with people I considered my superiors who I saw as being very critical of things that I was doing.
>
> So, for instance, if I was handling a file and someone came into my office screaming 'you're an idiot. What are you doing with this? You are going to shut me down after 35 years of being in business.'
>
> My reaction was to make sure I didn't have to deal with that. Unfortunately, I chose the wrong path. Rather than either quitting or working twice or three times as hard, I simply buried files so that people wouldn't be finding them and criticizing them. I don't do that any more. I only handle maybe two or three files at a time and each one gets the full amount of time that it needs.
>
> I work under very close supervision with the Public Defender's Office. I don't do anything without checking with them. They watch the deadlines for me. Although I do keep an eye on the deadlines and meet them, nevertheless there's that oversight. Also there's the oversight of the Appellate Division.
>
> So I guess what I am saying to you is the few cases I'm handling are not within a context that would give rise to these problems. That's the best that I can do to answer your question.

In the earlier disciplinary matter, respondent also submitted a letter from his treating therapist. The letter stated that he had been making progress and appeared committed to continuing his treatment.

Given that respondent has once before made this argument about his psychological problems, once before fabricated a document and, once before abandoned his clients, there can be no assurance that respondent will not repeat his behavior. This attorney has been

given sufficient opportunity to rehabilitate himself, to no avail. Protection of the public requires that he be disbarred. The Board unanimously so recommends. One member did not participate.

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

Dated: 9/18/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board