

Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-360

IN THE MATTER OF :
RICHARD J. WEBER, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 17, 1993

Decided: February 28, 1994

Paul E. Newell appeared on behalf of the District IX Ethics Committee.

Frederic M. Milstein appeared on behalf of respondent.

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 public discipline filed by the District IX Ethics Committee (DEC). The formal complaint charged respondent with violations of RPC 1.3 (lack of diligence) and RPC 1.4 (failure to communicate with the client). The hearing panel's vote in this matter was split: two members voted for public discipline, while one member considered a private reprimand to be sufficient.

Respondent was admitted to the New Jersey bar in 1970. He maintains a law office in Neptune, Monmouth County. He has no previous discipline.

Prior to January 1991, Wilmetann Ciccone retained respondent to represent her in a personal injury matter arising from a slip

and fall in a grocery store in May 1986. The case was tried on January 23 and 24, 1991, before the Honorable Arthur Blake. At the close of the case, it was dismissed by the court (T6).¹

After the dismissal of her case, Ciccone asked respondent to file an appeal. Respondent agreed (T6-7). Ciccone paid respondent approximately \$1,017.00 to cover costs of the appeal (Exhibit DEC-7).

Respondent filed the appeal. After reviewing the transcripts in the case, however, he concluded that an appeal would be ineffectual. Respondent thus determined not to file the appellate brief and to allow the case to be dismissed. This notwithstanding, in a letter of July 17, 1991 to a court reporter at the Monmouth County Court House (Exhibit DEC-7), respondent affirmatively misrepresented the status of the appeal to Ciccone. His letter contained a "b.p.s." to Ciccone, stating in part, "I intend on having the Brief completed and submitted during the summer." In fact, respondent had no such design. On December 31, 1991, the case was dismissed with prejudice by the Appellate Division for failure to file a timely brief (Exhibit DEC-6).

During the Spring of 1992, respondent spoke with Ciccone on one occasion, at which time he lied to her that the appeal was still pending. Ciccone and respondent had a similar conversation in the Summer of 1992, wherein he again lied to her that the matter was pending (T9). In September 1992, Ciccone telephoned

¹ T represents the transcript of the hearing before the DEC on August 23, 1993.

respondent, at which time he lied to her that the appeal had been denied. According to Ciccone, she subsequently telephoned respondent, asking for information about the appeal. She stated that, during the conversation, he agreed to return \$1,000 to her (T10). Thereafter, by letter dated October 28, 1992 (Exhibit DEC-3), respondent informed Ciccone that the appeal had been denied and refunded the \$1,000 that Ciccone had advanced for the appeal. His letter stated: "[t]he appeal was probably ill-advised and therefore, as promised, I enclose the firm's check in the amount of \$1,000.00 representing a refund to you of the costs which the firm has absorbed." Respondent testified that he informed Ciccone of the dismissal in the Fall of 1992 "because that's the same time frame I told her in which the Appellate Division would have rendered a decision" (T24).

On November 3, 1992, after receiving respondent's October 28 letter, Ciccone wrote to him, requesting that he forward to her the documents from the appeal, including the court's order, to enable her to better understand what had occurred in the case. Ciccone's letter indicated that, if there was any charge for this additional service, respondent should send her a bill and she would pay any reasonable amount (Exhibit DEC-4). After failing to receive a reply from respondent, Ciccone sent a similar letter, dated November 19, 1992, attaching her earlier request (Exhibit DEC-5). Respondent did not reply. (Respondent made a reference in his testimony to having written to Ciccone in late December 1992. However, this letter was not made a part of the record and Ciccone

did not refer to it.) Ciccone then contacted the court to obtain information, whereupon she received a copy of the order dismissing the appeal (DEC-6). As to why he had not forwarded the requested documents, respondent testified that "there was nothing really to send her" (T24).

Respondent admitted the factual allegations against him, but denied that his conduct violated the Rules of Professional Conduct. He explained that he initially recommended an appeal but, after reading the transcripts, he realized that it was futile and a waste of time for himself, his adversary and the court (T19). Respondent, therefore, decided not to file the brief. Having told Ciccone that the appeal would take approximately one year, he decided to wait until the year was up to inform her of the outcome, rather than admit that he had made an error in judgment (T20). Therefore, when Ciccone telephoned him, he lied about the status of the case, intending to tell her that the appeal had been denied when the one year had passed, which he did. By way of explanation for his misconduct, respondent stated that Ciccone and her family were long-time clients of his law firm and that he was embarrassed (T26). During the DEC hearing, the following exchange took place:

Q. . . . But at that time you knew, did you not, that you were going to have to face her somewhere down the road and tell her that the case was dismissed procedurally and not on its merits or advise her to the contrary that you decided that the case wasn't worth the appeal, that you allowed it to be dismissed, or did you look that far?

A. I didn't look that far ahead.

Q. Then at the end it was dismissed, she was making inquiries, you did get that letter where she asked for

specifics, what was your thought pattern at that point when she asked you why and you told her what basically was incorrect information?

A. I made the decision in the summer of '91 the appeal was futile, I told her it would take about a year and that was the reason I timed my telling her that it had been dismissed.

Q. So would it be fair to say that during the year before or subsequent to the dismissal it was your plan to advise her that there was a decision on its merits by the Appellate Division denying the appeal?

A. I was just going to advise her the appeal had been dismissed, that's all.

Q. But not because of procedural defects but implied at least on the merits?

A. I didn't give that any consideration.

* * *

Q. If I might, [respondent], when you wrote the letter of October 28 you didn't indicate that the appeal was dismissed for failing to file a brief, isn't that correct?

A. I don't know what the letter says.

Q. Well, the letter says that the appeal had been denied, when you used that terminology did you recognize that that would sound to a layperson as if it had been denied on the merits and was not a procedural dismissal?

A. I can't tell you. It had been denied and that's what I put in the letter.

[T26-28]

The DEC found that respondent violated RPC 1.3 and RPC 1.4(a). Two panel members recommended public discipline, based upon respondent's repeated lies to Ciccone and his failure to file the brief. These members described respondent's misconduct as "affirmative acts, not acts of omission, neglect or procrastination" (Panel Report, paragraph 8). These two members

also noted that respondent's letter of October 28, 1992, stating that the "appeal had been denied," was an attempt to make Ciccone believe that the appeal had been dismissed on the merits, rather than on procedural grounds. The dissenting member recommended a private reprimand, based upon the fact that respondent has had no other disciplinary complaints since his admission to the bar in 1970. That member considered that respondent was remorseful and recognized the consequences of his actions. The dissenting member also noted respondent's substantial community involvement.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent is guilty of unethical conduct is fully supported by clear and convincing evidence.

The DEC found respondent guilty of a violation of RPC 1.3 and RPC 1.4(a) only. The record is clear, however, that respondent also violated RPC 1.4(b) (failure to provide sufficient information to allow the client to make informed decisions about the case) and RPC 8.4(c) (misrepresentation). Respondent permitted Ciccone's appeal to be procedurally dismissed for failure to file a brief, based upon his belief that he could not win the appeal. This was not respondent's decision to make. His role was to advise his client and to allow her to make the determination on how to proceed. Furthermore, respondent deceived his client for over one

year, allowing her to believe that the appeal was pending. He then attempted to mislead her into believing it had been dismissed on the merits. Although neither of these violations was charged in the complaint, the issues were fully litigated at the DEC hearing, with no objection from respondent. Accordingly, the complaint may be deemed amended to conform to the proofs. In re Gavel, 22 N.J. 248, 250 (1956).

Respondent conceded that he had made an error in advising that the appeal be taken and was embarrassed to so confess to his client. He believed that, since she would have lost the appeal anyway, he could wait the appropriate amount of time and then inform her that the case had been lost. Presumably, respondent believed that there was no harm and, therefore, no foul. Regardless of his intentions or beliefs, however, his conduct was wholly inappropriate. Instead of being candid with his client, he decided to let the appeal die a quiet death, with the purpose of misleading her that it had been denied by the appellate court. In the process, he made numerous misrepresentations to his client that the appeal was pending. Attorneys must be able to give bad news to their clients.

The Board has noted that, in mitigation, respondent readily admitted his misconduct, was not motivated by evil purposes but, instead, by embarrassment because of his long-standing relationship with his client and her family, was remorseful and has no previous ethics violations. Despite these mitigating factors, respondent's conduct warrants a public reprimand. "[I]ntentionally

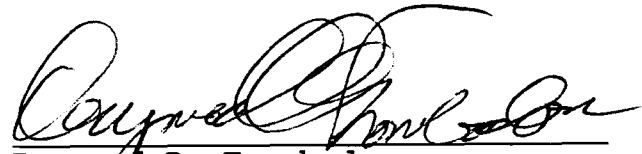
misrepresenting the status of lawsuits warrants public reprimand. (citations omitted)" In re Kasdan, 115 N.J. 472, 488 (1989). The Board, by a requisite majority so recommends. One member dissented, believing that a private reprimand is sufficient discipline. One member recused himself. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: _____

2/28/94

By: _____



Raymond R. Trombadore
Chair

Disciplinary Review Board