SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-443

IN THE MATTER OF

LOUIS F. WILDSTEIN,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 9, 1994

Decided: July 1, 1994

Frank Angelastro appeared on behalf of the District VA Ethics Committee.

Daniel M. Hurley 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 VA Ethics Committee (DEC). The second amended complaint charged respondent with violation of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect, withdrawn by the presenter, 3T 20-21),[1] RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 8.1(b) (failure to cooperate with the DEC, mistakenly charged as RPC 8.1(c)) and RPC 8.4(a) (violation of the Rules of Professional Conduct). The

[1] 1T represents the transcript of the hearing before the DEC on August 18, 1993. 2T represents the transcript of the hearing on August 19, 1993. 3T represents the transcript of the hearing on September 2, 1993.

DEC considered four matters, one of which, the Campbell matter, was dismissed, except as to the alleged violation of RPC 8.1(b).

Respondent was admitted to the New Jersey bar in 1978 and has been in private practice in Newark, Essex County. He voluntarily withdrew from practice in September 1991. He has no history of discipline.

The facts of the cases considered by the DEC are as follows:

The Melillo Matter

Victor M. Melillo retained respondent, his second cousin, to represent him in connection with a work-related automobile accident that occurred on September 9, 1983. A contingent fee agreement was signed on October 4, 1983 (Exhibit C-27). Although Melillo retained respondent, the case was originally handled by another attorney in the firm for one and one-half years, and was then given to respondent (1T 118-119, 145).

Respondent filed a workers' compensation petition against Melillo's employer. The case was scheduled to come on for pre-trial conferences nine times. Respondent was uncertain as to why the case had not gone forward on the nine scheduled occasions. On December 12, 1986, the employer's attorney filed a motion to dismiss the petition (Exhibit C-32). Respondent did not oppose the motion. Respondent did not recall receiving the notice to dismiss, and explained that he did not see it until after the motion was granted, in February 1987 (2T 118). Respondent testified that he did not tell Melillo about the dismissal because he did not know

about it at the time (2T 190). Respondent did not take appropriate action to have the petition reinstated.

Melillo was operating a commercial vehicle during the accident and was not eligible for uninsured motorist coverage under his own policy. Further, because he was eligible for workers' compensation, he was ineligible to make a claim against the unsatisfied claim and judgment fund. Respondent testified that he filed a complaint against the party responsible for the accident and then allowed it to be dismissed for lack of prosecution, because there was no way to find the defendant and because the suit did not seem viable, given the lack of potential recovery. (The defendant was uninsured) (2T 117).

Melillo testified that, from 1987 to 1988, he attempted to contact respondent between twenty-five and fifty occasions, usually leaving messages with his secretary (1T 134, 138). He was able to reach respondent twice. On both times, respondent stated that he was unable to speak with him and promised to call back (1T 123). In April 1989, Melillo retained John N. Armellino, Esq., who also attempted to communicate with respondent to learn about the status of the case, via a number of telephone calls and letters dated April 25, 1989 and June 21, 1989 (1T 158). Respondent failed to reply to Armellino's communications. After the ethics grievance was filed, Armellino made no further attempts to reach respondent (1T 162). As of the date of the DEC hearing, the file still had not been provided to Melillo or Armellino.

Respondent claimed that, to his knowledge, he did not refuse any calls from Melillo, during 1988 or 1989, or with Armellino (2T 121). Respondent explained that, at the time of Armellino's April letter, he was in the hospital. When the June letter came, his father was coming home from the hospital and his wife's grandmother had just died (2T 122). Respondent testified that there was no reason for his failure to send the file, "except for [his] inability to face up to things" (2T 193).

Respondent testified that his law firm employed an outside attorney, Ruth Pearlman, Esq., to handle their workers' compensation cases. She would come in once a week to pick up files, documents and telephone messages. Respondent surmised that the notice to dismiss and the telephone messages might have been left for her. Pearlman did not testify before the DEC. However, respondent testified that she had told him that she did not recall Melillo's matter at all (2T 211). Melillo confirmed that, in fact, he received communication from Pearlman, who counseled him to see a physician. He did and so advised her. It was Melillo's belief that Pearlman worked with respondent (1T 147-148).

The DEC found respondent guilty of a violation of RPC 1.1(a) and RPC 1.4. The DEC did not fault respondent for failing to pursue the third-party suit, which would not have been worth the time and expense. The DEC noted, however, that the decision should have been made with Melillo's participation (Hearing Panel Report at 7).

The Campbell Matter

Christopher Campbell retained respondent to represent him in connection with two automobile accidents. Campbell alleged that respondent failed to reply to his requests for information about the matters. After the grievance was filed, respondent obtained Campbell's permission to continue to represent him. Both cases were concluded and resulted in monetary settlements that were satisfactory to Campbell. After the second case, Campbell testified before the court that he was satisfied with respondent's handling of both cases. Campbell did not appear at the DEC hearing, although he was advised of it.

At the hearing, the presenter moved to dismiss this count of the complaint as to Campbell, but reserved the right to proceed on the sixth count of the complaint — failure to cooperate with the DEC (1T 100). The panel granted the motion.

The Hines Matter

In September 1981, Mrs. Johnnie Hines retained respondent to assist her in matters arising from the death of her husband, who had died while at his job. Mr. Hines, a Greyhound bus driver who worked out of New York, died of a heart attack while driving the bus in Connecticut. He had had a previous heart condition and had been out of work. Although Greyhound's doctors had pronounced him fit to return to work, Mr. Hines suffered his fatal heart attack during his first week back at work.

Mrs. Hines wished to pursue an action against Greyhound. She met with respondent's paralegal, who had her sign a contingent fee agreement and a blank New Jersey Employees' Claim Petition. The paralegal obtained a statement and a medical authorization from Mrs. Hines as well. Respondent testified that this was his usual workers' compensation procedure and that he was aware that some of the documents were not applicable (2T 24).

Respondent testified that Mrs. Hines had originally consulted with him about several aspects of her husband's estate and that the workers' compensation claim was his idea (2T 22). Respondent saw no basis to proceed in New Jersey and was of the opinion that the action belonged in New York, although he was uncertain if a recovery was warranted in New York. He informed Mrs. Hines that he would obtain the services of an attorney licensed in New York to pursue the action. Respondent also wrote to the Compensation Rating Bureau, on October 2, 1981, to learn the identity of the carrier (2T 107, Exhibit C-13).

On October 23, 1981, respondent referred Mrs. Hines' case to Eliot S. Levine, Esq., an attorney admitted in New York. By letter dated November 24, 1981, Levine suggested, among other things, that respondent file a workers' compensation claim petition in New Jersey, as a precaution (Exhibit C-15). Respondent did not do so. Respondent produced a letter dated December 29, 1981, from Levine to Mrs. Hines, forwarding documents for her to fill out and return (Exhibit R-11). Although Mrs. Hines has no recollection of receiving the letter (1T 63-64), she apparently brought the

documents to respondent for his assistance in completing them. Although they bear her signature (2T 29-30, 177), she has no recollection of signing the documents (1T 73-74, 88, Exhibits R-13A through R-13I). Respondent forwarded the documents back to Levine on January 19, 1982 (Exhibit C-25).

By letter dated April 12, 1982, Levine contacted Mrs. Hines and requested $500 for medical expenses and investigations. The letter stated that, if the funds were not received by April 28, 1982, the file would be closed (Exhibit C-17). Mrs. Hines and respondent discussed the letter and determined that respondent would either try to have Levine reduce the amount or would look for another attorney. According to Mrs. Hines, respondent advised her not to send the money (1T 53, 68). She never contacted Levine. She testified that she believed that Levine was not representing her in New York, because she had never sent the money. It was Mrs. Hines' belief that respondent would find another attorney to represent her (1T 79).

Respondent testified that he spoke with several other attorneys, who were active in workers' compensation practice in New York, about the propriety of an attorney's obtaining funds in advance in a compensation case, since the practice is forbidden in New Jersey. He was advised that this was in order in New York and that the $500 figure was reasonable. Respondent testified that, in fact, Levine agreed that he would lower the $500 amount (2T 36). According to respondent, he provided this information to Mrs. Hines, who stated that she would contact Levine. Respondent

believed that she would do so. Mrs. Hines, however, did not recall the conversation. Respondent maintained that it was not until 1988 that Mrs. Hines informed him that she had never paid Levine (2T 37-38).

By letter dated May 7, 1982, (Exhibit C-20) Levine informed Mrs. Hines that her file would be closed on May 20, 1982, unless communication was received by then. Mrs. Hines did not recall receiving this letter, although respondent did receive a copy. By letter dated February 8, 1983, Levine informed Hines that no further work would be done on her case and further informed her of the statute of limitations on her claim (Exhibit R-12). Mrs. Hines had no recollection of receiving the letter (1T 71-72). Respondent received a copy of the letter, although he was uncertain as to how he obtained it (2T 179). Respondent testified that he told Mrs. Hines to contact Levine (2T 182).

A workers' compensation claim had been filed in New York (2T 30) and, inexplicably, nearly one year later, the New York compensation court sent Mrs. Hines a notice of hearing on April 8, 1983. Mrs. Hines had no recollection of being notified of the hearing (1T 77). Respondent testified, however, that Mrs. Hines brought the notice to him after the return date had passed (Exhibit C-21). Respondent wrote to the New York Compensation Board, on October 3, 1983, to learn the outcome of the hearing, but never received a reply (2T 105-106). He did not follow up but, rather, instructed Mrs. Hines to discuss the matter with Levine (2T 183, Exhibit C-22). According to respondent's testimony, he never

considered the workers' compensation matter to be his responsibility (2T 106).

Mrs. Hines testified that she attempted to telephone respondent on numerous occasions and that she also took time off from work to go to his office to see him. Although she left messages for him, respondent either failed to reply to her calls or, on the few occasions on which she contacted him, told her that he did not remember her case. Mrs. Hines further testified that respondent would advise her to stay in contact and that he would pursue the case (1T 53,55).

Approximately one year went by without any contact between respondent and Mrs. Hines (1T 83). Mrs. Hines testified that, in the late 1980s, she spoke with respondent, who told her that

> he had went [sic] beyond the statute of limitations and that the only thing that he could recommend for me to do is to sue him or take him before the board. He asked me if I needed a lawyer, that he would recommend me one. And after that, I haven't had any more contact with him. [1T 57]

By letter dated June 10, 1987, Lessie Hill, Esq., advised respondent that she had been hired by Mrs. Hines to pursue a malpractice claim against him (Exhibit C-40). Subsequently, respondent paid Mrs. Hines $2,000, allegedly as nuisance value.

The DEC was of the opinion that the extent of respondent's mishandling of the case was a close question. The DEC found that he had forwarded the case to New York counsel, had discussed the propriety of the $500 fee with Mrs. Hines and had been advised that Levine was closing out his file. However, the DEC also found that the documents respondent had Mrs. Hines fill out at the outset

could have misled her that he was actively representing her. In addition the DEC found that respondent failed to file the New Jersey petition, as Levine had suggested, and had failed to follow up with the New York Compensation Board as to the outcome of the April 8, 1983 hearing. The DEC failed to find clear and convincing evidence of gross neglect. It found, instead, "simple neglect" (Hearing Panel report at 15). The DEC concluded that respondent had violated RPC 1.3 and RPC 1.4(a) and (b).

The Hreha-Coloccia Matter

Respondent successfully represented Nancy Hreha-Coloccia in an arbitration proceeding arising from an automobile accident on March 26, 1986. Her recovery was $125,000. At the time that money was disbursed, May 1989, $1,500 was paid to respondent as a retainer to file a PIP suit against Hreha-Coloccia's insurance carrier for unpaid bills from the same accident.

Respondent submitted documentation to the DEC demonstrating that he could have been led to believe that Continental was the PIP carrier. Respondent drafted a complaint for PIP benefits naming Continental Insurance Companies/Underwriters Adjusting Company (an arm of Continental) as the defendant. This was done on April 6, 1989, one month prior to his receipt of the retainer. Respondent testified that he gave the complaint to a secretary, intending that it be filed with the Essex County Superior Court, Special Part.

Hreha-Coloccia testified that she had been told that the complaint had been filed, but then heard nothing further.

Beginning in or about January 1990, she made numerous attempts to contact respondent. She was told that he was either unavailable or would call her back. Respondent did not return her calls. In fact, Hreha-Coloccia's testimony was that she had no contact with respondent from January 1990 through May 1990 (1T10-12). Her telephone bills (Exhibit C-1) revealed the number of calls she placed to respondent and the length of time she was kept on hold, up to eighteen minutes.

By certified letter dated May 14, 1990 (Exhibit C-3), Hreha-Coloccia requested that respondent return the unearned portion of the retainer within ten days and further advised him that she had obtained new counsel. By letter dated December 18, 1990, Thomas DeVita, Esq., contacted respondent and requested the file and a signed substitution of attorney form. The full retainer was returned in December 1990, several months after the filing of the ethics complaint. By letter dated June 1, 1991, Hreha-Coloccia requested that her file be sent to DeVita. The file was turned over to DeVita in mid-1992.

Respondent testified that, in late 1990, he was reviewing the file and saw no copy of the filed complaint. He learned that the court also had no record of the complaint. Apparently, the secretary on whom respondent relied to file the complaint worked with his law firm for only two weeks. Accordingly, in late November or early December 1990, respondent refiled the complaint, despite Hreha-Coloccia's May 14, 1990 letter, and the fact that she filed an ethics grievance on June 1, 1990 (2T 8-10). He explained

that, when he learned that the complaint had not been filed, he felt that he should do so. Respondent did not inform Hreha-Coloccia of his actions (2T 156-157).

In April 1991, respondent was served with a motion for summary judgment (2T 11, Exhibit C-40). Relying on N.J.S.A. 17:30E-7(e), Continental asserted that it was not liable, as it was a servicing carrier for the JUA. With its moving papers, Continental provided an unpublished Appellate Division opinion supporting its position that respondent should have sued the JUA. Respondent was unaware of the statute granting immunity to servicing carriers (2T 14). He believed that Continental's attorney was correct and determined not to oppose the motion. He failed to discuss it with Hreha-Coloccia or contact her new attorney and did not forward the notice of dismissal (2T 164-165). Respondent testified that he did not believe that he was representing her at that time. The case was in "a state of limbo."

Respondent testified that he failed to reply to Hreha-Coloccia's requests for information between January and May 1990, because he was "putting his head in the sand" (2T 18). Respondent added that, at the time, he was having psychological difficulties (2T 19. See discussion, infra).

The DEC assumed that the complaint was filed, as respondent testified, The DEC remarked, however, that it made little difference, for the purposes of finding unethical conduct, whether or not the complaint had been filed. According to the DEC, had respondent bothered to review the file, he would have realized that

the complaint had not been filed, either because his secretary had made a mistake or because the clerk of the court had misplaced it. As the DEC concluded,

> [t]he mistake could have and should have been picked up by routine follow up or would have manifested itself if respondent had pulled his file and spoken with Coloccia on one of the many times that she called. Further a check limited to $75.00 purportedly was sent with the complaint. This must have appeared as uncashed on at least 15 bank statements in between.
> [Panel Report at 19]

The DEC found "that the simple negligence in failing to follow up on the PIP suit was converted to gross negligence when 15 months elapsed between the filing and the Ethics Complaint during which time he had failed to speak with his client. This was in violation of RPC 1.1(a)." (Panel Report at 20) The DEC also found a violation of RPC 1.3 (deemed a "lesser included offense within RPC 1.1(a)" (Panel Report at 21) and RPC 1.4. The DEC did not fault respondent for failing to sue the JUA, noting how little known the applicable statute is. Hreha-Coloccia's new attorney was able to resolve the issue of the outstanding PIP bills. Further, the DEC did not find a violation of RPC 8.4, which it interpreted to refer to intentional acts, not negligence or failure to communicate.

Failure to Cooperate with the DEC

The DEC presenter sent a number of letters to respondent in 1990, seeking information about the above four matters (See Exhibits C-23, C-24, C-33, C-34, C-36 and C-37). Respondent provided information on the Hreha-Coloccia matter only, by letter dated December 17, 1990. He admitted that he "put his head in the

sand" with regard to the complaints filed against him (2T 193-194). The DEC determined that respondent had violated RPC 8.1(b).

* * *

Lewis Cohn, Esq., an attorney familiar with respondent's professional skills, and retired Municipal Court Judge Carl Stier, before whom respondent had appeared in the past, testified at the DEC hearing. Both praised respondent's knowledge and ability and were aware of no impediment to his fitness to practice law. The Board noted, however, that Judge Stier could not recall the last time that respondent appeared before him and, when asked what type of law respondent practiced, replied that he did not have "the vaguest idea" (1T 174).

Dr. Hans H. Gregorius, respondent's psychiatrist, offered extensive testimony on respondent's psychological and physical difficulties. According to Dr. Gregorius, respondent suffers from a digestive disorder that led to treatment by twenty-two doctors and to seventeen hospitalizations from the late 1970s through 1991. Dr. Gregorius also testified about respondent's bipolar disorder. Respondent has apparently suffered from this condition since adolescence, but the condition worsened when his mother died in May 1983 and was further exacerbated by the death of his father in November 1987. There were also several other family deaths within a relatively brief period of time (2T 133). (Respondent's aunt died four days after his father). Respondent attempted suicide in

September 1991 because, according to his testimony, he was not meeting the standards he had set for himself (2T 140). He has not practiced law since that time.

Dr. Gregorius professed his belief that respondent is now capable of practicing law and that he is mindful of his limitations and of the need for "a rearrangement of his priorities" (2T 73). Respondent currently takes lithium and prozac, in addition to a number of other substances for his digestive disorder. (There were no allegations of substance abuse in this matter (2T 60)).

Respondent provided candid testimony regarding his physical and psychological problems. Apparently, respondent's father, who was a senior member of respondent's law firm, was a very demanding, difficult employer. Dr. Gregorius and respondent testified about respondent's psychological problems with his father (2T 57-58). Respondent explained that

> [b]asically from 1943 to 19 the late 80's, my father saw the law firm as a one man firm, and every other individual was an appendage of him. He made demands from his secretary such as changing their dates of wedding [sic] because it was in July and it conflicted with his end of the year and he needed her. My own wedding, changing the date to July 15. Until 1982, everybody worked Monday through Friday to at least 6:00, if not later and Tuesday and Thursday nights to 10:00, half a day Saturday. That was the minimum. I don't know how, without giving examples. All I can say is that he was a brilliant man, but unbelievably demanding on all his employees. And without going into names, everyone will tell you that we were -- had one of the most thoroughly prepared files, because he made this demand and took his system. But as far as me going, it could be quite a problem. Even down to when I was working in a bond firm, he would call me up and say, 'Can you go to East Orange Municipal Building and pick me up a police report and bring it down to me in an hour?'
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> [2T 145-146]

Respondent explained that the difficulties with his father worsened when the latter became ill and placed more demands on respondent (2T 133-135).

Respondent also testified as to the type of work that he would like to do in the future:

> I want to go back and do what I never was able to do, and that's work on cases as a prep man, as to some degree, a back room man in the sense that, God forbid there be a problem with me, not mental, but physical illness, I won't be assigned a particular case that I could be doing specific areas such as summaries, such as interrogatories on a particular file and then doing settlements and [sic] as well. So that would allow me the ability to slowly see how I'm functioning, to have my partner confirm how I'm functioning and it will not create this stress, which before, which was a trial practice. And I'm sure, you know, what it can be like. And maybe I'll do some municipal court to remind me of what a trial is like, but that's what, if I'm given the opportunity, I would like to do. And, I mean, I've taken these two years until I could figure this all out.
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> [2T 144-145]

## CONCLUSION AND RECOMMENDATION

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. It is clear that respondent violated RPC 1.1(a) and RPC 1.4 in Melillo and RPC 1.1(a), RPC 1.3 and RPC 1.4 in Hreha-Coloccia. As to the Hines matter, the Board found credible respondent's testimony that he believed that Mrs. Hines was following his instructions to contact Levine and that he was not in charge of that case. Accordingly, the Board finds no violation of

RPC 1.1(a) in Hines. However, the Board agrees with the DEC's conclusion that respondent violated RPC 1.3 and RPC 1.4.

Further, the Board agrees with the DEC's determination that respondent's actions in these matters do not constitute the type of misconduct contemplated by RPC 8.4.

With regard to respondent's violation of RPC 8.1(b), the Board noted that respondent answered the complaint and was cooperative and candid before the DEC. The Board, therefore, finds no violation in this regard.

In prior cases dealing with similar conduct, the Court has imposed a three-month suspension. See, e.g., In re Marlowe, 121 N.J. 236 (1990), where the attorney, who was previously publicly reprimanded, engaged in a pattern of neglect in two cases (in one case he simply abandoned his client), misrepresented the status of the matters, failed to communicate with his clients and failed to cooperate with the disciplinary system by not replying to the investigator's requests for information and not appearing at the Board hearing.

Respondent has set forth not only physical but psychological obstacles that have impeded his practice. Although psychological difficulties are not an excuse for his misconduct, such difficulties, if proven to be causally connected to the attorney's actions, have, in the past, been considered as mitigation. In In re Templeton, 99 N.J. 365 (1985), the Court held:

> In all disciplinary cases we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently

> for some credible reason other than professional and personal immorality that could serve to explain, and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of transgressions is not intractable dishonesty, venality, immorality, or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment.
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> [Id. at 373-374]

But see In re Tuso, 104 N.J. 59 (1986) (where causation was not demonstrated).

According to Dr. Gregorius, with regard to respondent's psychological difficulties, his condition worsened in 1983, the time period involved in the within misconduct. (Although the misconduct in Hines began earlier, there is an overlap.) This respondent did not act out of venality, but was clearly unable to cope with the day-to-day requirements of the practice of law, such as sending a follow-up letter to the New York Compensation Board in the Hines matter. Although respondent did not become completely dysfunctional, his psychological problems, combined with his physical difficulties, numerous hospitalizations and deaths in his family provide substantial mitigation for his misconduct.

Based upon the mitigating factors, the Board deems a public reprimand to be sufficient discipline and unanimously so recommends. See, e.g., In re Chatburn, 127 N.J. 248 (1992) (pattern of neglect in three matters, failure to communicate; previous private reprimand); In re Clark, 118 N.J. 563 (1990) (lack of diligence in four matters, failure to communicate and failure to

return retainer, despite promises to grievant and request by new counsel).

The DEC suggested that respondent be allowed to practice only under the supervision of a proctor and further suggested that respondent be examined under R. 1:20-(9)(b) to determine his ability to practice law. The Board agrees and recommends a proctorship for one year. The Board further recommends that respondent be examined by a psychiatrist, approved by the Office of Attorney Ethics, to determine his fitness to practice law. One member did not participate.

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

Dated: 7/1/94

By: Raymond R. Trombadore

Raymond R. Trombadore, Esq.
Chair
Disciplinary Review Board