SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-238

IN THE MATTER OF :
PERRY J. HODGE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 15, 1992

Decided: September 25, 1992

Frederic S. Kessler appeared on behalf of the District VA Ethics Committee.

Ronald Hunt 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. That recommendation describes misconduct by respondent in his representation of three clients, and further addresses charges of a pattern of neglect, failure to maintain a bona fide office and failure to cooperate with the district ethics committee in the underlying matters.[1]

Respondent was admitted to the New Jersey bar in 1984 and has been engaged in the practice of law in Newark, Essex County. The facts of these matters are as follows:

[1] One matter was dismissed by the DEC.

The Sears Matter, District Docket No. VA-89-35E

During late spring 1987, Hilbert and Shirley Sears retained respondent to represent them in connection with litigation pending in the Chancery Division of the Superior Court, Essex County. The litigation involved an agreement between the Searses and two others, whereby the Searses were to provide the capital to purchase a piece of property and the other two individuals would make necessary repairs. Respondent was also retained to represent the Searses in connection with other properties they were planning to purchase. The Searses alleged that, in connection with the litigation, they turned the complaint over to respondent for the purpose of preparing and filing an answer. Instead, respondent allowed first a default and, subsequently, a default judgment to be entered against the Searses. During this time, respondent failed to communicate with the Searses. It was not until the default judgment was entered against them and discovery of their assets began, that they retained another attorney who was able to have the judgment vacated.[2]

Respondent also acted as the closing attorney in the purchase of other properties by the Searses in 1987. The Searses alleged that, despite numerous requests, respondent failed to turn over to them closing statements or provide closing documents. In addition, he failed to account for funds he collected in connection with the closings. Despite the fact that a grievance was filed in this

[2] The Searses were held responsible for their adversary's attorney's fees in connection with the cost of the litigation.

matter in January 1988 and despite the involvement of the DEC, respondent did not account for the funds until October 1989. After the accounting was ultimately provided, there was a further delay of two months before respondent gave the Searses the $135 that was owed to them.

During his testimony in this matter, respondent indicated that it was difficult for him to proceed in his representation of the Searses because Mr. Sears was out of state and the Searses would give respondent differing directions (T11/1/90 71). Respondent also testified that he was never retained in the matter (T11/1/90 70).

The DEC determined that respondent violated RPC 1.3, RPC 1.4 and RPC 1.15(b) in connection with his representation of the Searses. With regard to respondent's argument that he was never formally retained, the DEC stated that "[t]he respondent's response that he was never formally retained in the litigation is simply incredible given the exchange of correspondence and the documentary evidence indicating his involvement in the matter" (Hearing Panel Report at 14).

The Lantz Matter, District Docket No. VA-89-09E

Barbara Lantz was the beneficiary of her mother's life insurance policy from Prudential Insurance Company (Prudential).[3]

[3] It appears from the exhibits that Lantz' mother died in May 1988 and that the first check was issued in July of that year.

Prudential mistakenly issued two checks to Lantz, each in the amount of approximately $19,000. Lantz kept one check and gave the other to respondent to hold on her behalf.[4] When Prudential realized its error, Prudential contacted Lantz for the return of the check. Lantz then contacted respondent and, subsequently, on November 11, 1988, enlisted the aid of another attorney, Irving J. Soloway, to assist her in retrieving the check from respondent.

Soloway testified[5] that he wrote to respondent on November 11, 1988 and that, on November 16, 1988, he received a telephone call from respondent, stating that he had not received Soloway's letter.[6] During that conversation, respondent indicated to Soloway that, although he had the check and was willing to return it, he would first deduct the amount of the funeral expenses and attorney fees. Soloway sent a second letter on November 22, 1988, reminding respondent that he had indicated that he would return the funds to Prudential and would reply to the November 11 request for an accounting. Respondent did not reply to the letters. On December 9, 1988, Soloway left a message for respondent, indicating that it was important that he speak with him. Respondent did not return the call. According to Soloway, respondent did telephone him on April 21, 1989, during which time Soloway stated that he would not

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[4] There were no allegations in this matter that respondent misappropriated the funds. The alleged misconduct was his failure to account and to return the funds entrusted to him.

[5] Soloway's testimony was taken via telephone.

[6] It was not clear how respondent knew that Soloway had written to him, if he never received the letter.

speak with respondent unless he replied to his two letters of November 1988. Soloway never received an answer to his letters or the accounting he requested from respondent.

On May 5, 1989, respondent sent a check to Prudential for $13,785.26, payable to Prudential and Lantz. An accounting was not provided until the DEC investigator intervened. On August 29, 1989, respondent provided an explanation for the sums he had deducted from the check before he sent the balance to Prudential.

Respondent's answer to the complaint and his testimony differed from Lantz' grievance. He contended that he had the first check and learned of the duplicate check from a representative of Prudential, who contacted him. According to respondent, he contacted Lantz who, at first, denied having received the second check, but then admitted receiving it and spending a considerable portion of the funds.

Respondent stated that he told Prudential that he would send a check for the balance of the money he held, payable to Prudential and Lantz, after he had received written confirmation of the agreement from Prudential (Respondent's answer at 4). In the interim, Lantz retained Soloway. Respondent stated that he asked Soloway to provide an authorization from Lantz to release her file to him and that Soloway never provided the release.[7] Respondent also stated that he told Lantz to pick up her file and that he attempted to send it to her via certified mail, but that she never picked it up and refused to claim it. Respondent further claimed

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[7] Soloway had no recollection of ever having been asked for a release.

that he had delivered the file to Lantz' home, where it was accepted by her sister.[8]

The DEC determined that respondent violated RPC 1.4 and RPC 1.15(b), in that he procrastinated in turning over monies due his client.

The Griffin Matter, District Docket No. VA-89-16E[9]

Bertha Griffin retained respondent to represent her and her husband in a personal injury action arising from an accident occurring in November 1987. Apparently, the Griffins were unhappy with the action taken by respondent on their behalf and had requested the return of their file in February or March 1989. Nevertheless, respondent did not turn over the file to the Griffins until late August 1989, more than three months after the grievance was filed and after the DEC investigator requested its return.

Respondent testified that he saw Mrs. Griffin weekly, for reasons other than the underlying matter,[10] and that it was not until the grievance was filed that he learned that she wanted her file back. Respondent believed that Mrs. Griffin wanted

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[8] In his answer, respondent stated that Lantz' sister told him that "Lantz was attempting to shift the burden of her attempted fraud" to respondent by filing the grievance and that the sister offered to assist respondent, if the matter was not resolved amicably. Respondent, however, neither called the sister to testify before the DEC on his behalf nor submitted a certification from her (See respondent's answer, Exhibit C-8, at 5).

[9] No testimony was offered in this matter.

[10] Griffin was an associate minister at a church respondent attended and was a member of a group respondent advised.

information on the status of her case and that the matter had been clarified. According to his testimony, Mrs. Griffin designated an individual to accept the file for her and respondent turned it over to that person.

The DEC did not make any specific findings of neglect with regard to this matter. Rather, the DEC considered it in connection with respondent's alleged failure to cooperate with the DEC, infra.

The Strickland Matter, District Docket No. VA-89-96E[11]

In April 1987, Irene Strickland retained respondent to represent her in a real estate matter, paying him $100. At the conclusion of respondent's representation, Strickland requested the return of her file and monies not utilized on her behalf. Despite Strickland's numerous attempts to contact him over an extended period of time, respondent never returned her telephone calls and letters.

On February 4, 1990, respondent paid Strickland $200 in exchange for a release from any complaints she might have filed against him.

The DEC did not pass upon the underlying allegations in this matter but, rather, considered this count in connection with the alleged failure to cooperate with the DEC. During his testimony, respondent indicated that, with regard to Strickland's waiver, it

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[11] No testimony was taken in connection with this matter.

was his belief that "she would not file [a grievance] or would withdraw one if one had been filed" (T12/19/91 108).

The DEC did not address the fact that an ethics grievance may not be waived by means of a release of this nature.

The Davis Matter, District Docket No. VA-90-43E[12]

Cerina Davis and her daughter were involved in an automobile accident on May 1, 1987. Shortly thereafter, she retained respondent to represent both in an action for personal injuries.[13] Respondent told Davis that he was pursuing the matter on her behalf and, in fact, according to Davis, informed her in September 1989, that he was about to settle the matter. According to Davis, however, when she contacted the court she was unable to find a record of a complaint having been filed on her behalf. She then retained another attorney to pursue this matter. According to Davis, respondent informed the attorney that he had, in fact, filed a complaint on May 1, 1989 in Essex County, but did not have the docket number. During a telephone call to the attorney, respondent informed him that he would deliver the file to him on May 4, 1990. The file was not delivered and subsequent letters and telephone calls were ignored.[14] As of the date the grievance was filed, May 18, 1990, the file had not been turned over.

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[12] No testimony was offered on this matter.

[13] The DEC did not consider the conflict of interest issue.

[14] In his letter to the DEC enclosing Davis' grievance, the attorney noted that he had been unable to reach respondent at his office and that he had left messages with respondent's answering service.

Just a few days before the first hearing date in this matter, November 1, 1991, respondent provided a copy of the complaint, which was filed on the last day before the statute of limitations ran.[15]

The DEC dismissed the allegation that respondent had not filed on Davis' behalf, but considered this matter in connection with respondent's alleged failure to cooperate with the DEC, infra.

Pattern of Neglect

The DEC found clear and convincing evidence of a pattern of neglect, in violation of RPC 1.1(b). Particularly significant to the DEC were respondent's dealings with the DEC investigator and with the attorneys who replaced him in representing his clients. The DEC found that respondent's conduct in this regard was remarkably similar to the way in which he dealt with his own clients.

Failure to Maintain a Bona Fide Office

Between late 1988 and September 1990, respondent had an arrangement with another attorney whereby respondent would move into the attorney's offices when certain renovations on them were completed. Until that time, respondent could see clients at those offices only by appointment and could receive mail there.

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[15] The record is unclear about what the current status of Davis' matter is.

Respondent had a telephone installed for his use, but it was in a room containing construction materials. During this time, respondent primarily received mail at a post office box and utilized an answering service. He was present in the attorney's office less than once a week. According to respondent's testimony, the renovations took considerably longer than expected because the attorney did not have the money to pay for them. After the renovations were completed and respondent found that they were not done to his specifications, he ended the arrangement.

Respondent admitted that, thereafter, beginning in approximately September 1990 and until the time of the ethics hearings in November and December 1991, he did not maintain an office. Respondent stated that he did not maintain an office because the DEC investigator gave him the impression that he was not supposed to be practicing law while the ethics matters were pending. The investigator denied having done or said anything to give respondent that impression (T12/19/91 51). It was respondent's contention that he was not actively practicing law at that time because he was not taking on any new matters but only completing old matters while working out of his home.

Failure to Cooperate with the DEC

The DEC investigator, Frederic Kessler, testified at the DEC hearing as to his involvement in these matters and his attempts to obtain information from respondent. Kessler was assigned in May 1989 to investigate the Marlowe, Lantz and Griffin matters. He

testified that, after receiving the grievances, he promptly wrote to respondent. When respondent did not reply, Kessler sent a second letter to him, dated June 13, 1989, warning that in the absence of a reply, the allegations would be deemed true. On June 14, 1989, respondent telephoned Kessler and left a message that he would submit a reply. Respondent did not leave a telephone number because he was unavailable. Despite his promise, respondent continued to ignore the DEC's requests for information. On July 3, 1989, respondent again telephoned Kessler, promising a response by the following week. Kessler informed respondent that he had some additional time because Kessler would be taking a vacation. When Kessler returned from vacation, he did not find a response waiting for him, but did find the grievance in the Sears matter. On July 18, 1989, Kessler sent another letter to respondent, requesting a reply in the Sears matter and reminding respondent that he had not replied in the other three cases. Subsequently, respondent contacted Kessler and asked to arrange a meeting. Kessler agreed to the meeting, if respondent provided written responses to the grievances. A meeting was scheduled for August 29, 1989, which respondent attended, bringing with him responses in two of the matters. On October 6, approximately five months after the first grievances were sent to respondent, he provided a reply to all four grievances. In his reply, respondent indicated that he either already had, or would immediately, turn over to his former clients the documents or monies due them. During a telephone conversation on December 8, 1989, Kessler learned that respondent had not

returned the Searses' money to them. According to Kessler, he contacted respondent again and, by the end of December, the Searses were finally paid.

In the interim, Kessler had received the grievance in the Strickland matter, which he sent to respondent, requesting a reply in ten days. Kessler sent a follow-up letter on January 31, 1990. No reply from respondent was forthcoming. Accordingly, the first formal complaint was filed in March 1990, at which time respondent contacted Kessler and asked if the matters could be resolved without a formal hearing. Kessler informed respondent that he had to reply to the grievances and complaint. Kessler did not hear from respondent again.

In June 1990, Kessler received the grievance in the Davis matter, sending it to respondent and reminding him that there were still two outstanding grievances. On June 15, 1990, respondent replied to the two pending grievances, seven months after the first request for information. Respondent again contacted Kessler and asked for a meeting. Kessler agreed to a meeting in July, if an answer to the complaint was filed. Kessler did not receive any correspondence from respondent, who subsequently contacted him, asking for an extension of time. Kessler informed respondent that it was out of his hands and referred him to the DEC secretary. Respondent requested an extension until August 15 and was granted one until August 1, on the condition that he also reply to the outstanding grievances. The answer alone was received on August 17. In late September 1990, Kessler again contacted respondent,

who returned his call on September 27. Respondent told Kessler that the matter had "slipped his mind." On March 4, 1991, Kessler sent another letter to respondent, giving him one week to reply. On March 14, after not hearing from respondent, Kessler filed his reports in the two outstanding matters. Respondent then contacted Kessler and asked for additional time; Kessler replied that it was out of his hands.

The DEC determined that respondent failed to cooperate with Kessler, in violation of RPC 8.1(b).[16]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is persuaded that the findings of the DEC are supported by clear and convincing evidence. The Board noted, however, that the DEC did not find that respondent grossly neglected the Sears matter, in violation of RPC 1.1(a). There, respondent allowed a default judgment to be entered against the Searses and, despite a letter from the court, instructing him to file the appropriate motion, took no action. The Board finds that such conduct did constitute gross neglect in violation of RPC 1.1(a).

Further, the Board finds that, in addition to the failure to cooperate found by the DEC in the Strickland matter, respondent's

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[16] The DEC report erroneously refers to a violation of RPC 1.1(b) instead of RPC 8.1(b).

conduct in that matter also constituted failure to communicate in violation of RPC 1.4 and failure to return client property, in violation of RPC 1.15.

With regard to respondent's violation of RPC 8.1(b), the Board recognizes that respondent appeared at the DEC hearing with an attorney and was cooperative during that proceeding. In addition, he apparently cooperated during the audit of his attorney books and records and no violations were found. However, respondent's conduct prior to that time was egregious. Despite numerous inquiries from Kessler over an extended period of time, respondent failed to cooperate with the DEC investigation, even after he promised to do so. His conduct in this regard violated RPC 8.1(b).

As found by the DEC, respondent was also guilty of lack of diligence, failure to communicate, and simple neglect. In addition, he exhibited gross neglect in the Sears matter and a pattern of neglect generally, in violation of RPC 1.1(b). Respondent also failed to turn over client files and/or money in several matters, in violation of RPC 1.15. Further, respondent failed to maintain a bona fide office and failed to cooperate with the DEC.

Respondent admittedly did not maintain a bona fide office for a portion of the time in question. The Board also notes that, under the definition of bona fide office, respondent's office arrangement with another attorney did not comply with the requirements of the rule:

> ... a bona fide office is a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours. A bona fide office is more than a mail drop, a summer home that is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted.
> [R.1:20-1(a)]

Respondent's arrangement, whereby his mail was sent to a post office box, his telephone was answered by a service and his clients were able to see him only by appointment, is exactly what the rule was designed to prevent. Respondent testified at the DEC hearing that he has since made other arrangements for an office (T12/19/91 99-102).

There is a wide range in the discipline imposed for conduct similar to respondent's. See, e.g., In re Mahoney, 120 N.J. 155 (1990), (public reprimand for four cases of lack of diligence, failure to communicate, pattern of neglect, failure to maintain trust account records and misrepresentation in one matter); In re Breingan, 120 N.J. 161 (1990) (public reprimand for a pattern of neglect in three cases, failure to communicate, lack of diligence in one case and failure to cooperate with the DEC. Breingan had previously been privately reprimanded); In re Bancroft, 102 N.J. 114 (1986) (public reprimand for gross neglect, failure to carry out a contract and knowingly prejudicing and damaging a client. He had received two prior private reprimands, but the misconduct in this matter took place before the earlier reprimands were issued); In re Smith, 101 N.J. 568 (1986) (three-month suspension for neglect in one matter, failure to communicate, failure to respond to the DEC and failure to appear at the first scheduled Board

hearing. In re Albert, 120 N.J. 698 (1990) (three-month suspension for lack of diligence, neglect and failure to communicate in two matters. In addition, Albert improperly withdrew a fee from an escrow account and failed to cooperate with the DEC and Board. Albert had previously been privately reprimanded for failure to reply to an ethics complaint. In re Parker, 119 N.J. 398 (1990) (six-month suspension for failure to return a retainer fee and failure to cooperate with the disciplinary authorities. In re Malfitano, 121 N.J. 194 (1990) (one-year suspension for a pattern of neglect in three matters, failure to communicate and misrepresentation to a client. His failure to cooperate with the district ethics committee was considered as an aggravating factor); In re Mintz, 126 N.J. 484 (1992) (two-year suspension for gross neglect in four matters, lack of diligence, failure to communicate, pattern of neglect, failure to cooperate and failure to maintain a bona fide office.)

Respondent is guilty of numerous violations of the Rules of Professional Conduct. The purpose of discipline, however, is not the punishment of the attorney, but "protection of the public against the attorney who cannot or will not measure up to the high standards of responsibility required of every member of the profession." In re Getchius, 88 N.J. 269, 276 (1982), citing In re Stout, 76 N.J. 321, 325 (1978). The severity of the discipline to be imposed must comport with the seriousness of the ethical infraction in light of all relevant circumstances. In re Nigohosian, 86 N.J. 308, 315 (1982). Mitigating factors are,

therefore, relevant and may be considered. In re Hughes, 90 N.J. 32, 36 (1982).

During his testimony, respondent spoke of his office situation, his father's illness, the ending of his relationship with a woman and what respondent termed depression. Respondent did not seek treatment for these problems and no medical testimony was offered before the DEC to substantiate respondent's claim that he suffered from depression (T12/19/91 96-98, 102-107).

Respondent's lack of previous discipline and the fact that he did ultimately cooperate with the DEC have been taken into consideration. In addition the Board has considered the difficulties attendant to the clientele that respondent serves as an attorney and the lack of support staff to assist him in his practice. Nonetheless, respondent's misconduct was serious and a period of suspension is required. Accordingly, the Board unanimously recommends that respondent be suspended for a period of three months and that upon reinstatement he should practice under the supervision of a proctor for two years. The Board also recommends that respondent retake the core courses offered by the Institute for Continuing Legal Education. Three members did not participate.

The Board further recommends that respondent be required to reimburse the ethics financial committee for administrative costs.

Dated: 9/25/92 By: Elizabeth L. Buff

Elizabeth L. Buff
Vice-Chair
Disciplinary Review Board