Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-421

IN THE MATTER OF :
ADELE M. STALCUP, :
AN ATTORNEY AT LAW :

Decision

Argued: January 31, 1996

Decided: September 18, 1996

Helen Fite Petrin appeared on behalf of the District I Ethics Committee.

Respondent appeared pro se.

This matter was before the Board based on a recommendation for discipline filed by the District I Ethics Committee (DEC), arising from respondent's handling of a personal injury matter. The complaint charged respondent with a violation of RPC 1.1(a) and (b), RPC 1.3, RPC, 1.4(a) and (b), RPC 1.5(c), RPC 1.16, RPC 3.2, RPC 4.1(a)(1), RPC 8.1(b) [cited as (c)] and RPC 8.4(a) and (c) [cited as (d)].

Respondent was admitted to the New Jersey bar in 1980. She is engaged in private practice in Penns Grove, Salem County.

By Order of the Supreme Court dated July 12, 1995, respondent was reprimanded for gross neglect, failure to communicate and improper withdrawal from representation, arising out of her handling of a criminal case.

The facts of this matter are as follows:

Walter R. Rennie and Janet A. Rennie, husband and wife, were involved in an automobile accident on November 12, 1987. Approximately one week later, the Rennies retained respondent to represent them in a claim for personal injuries sustained by Janet Rennie. Respondent had previously drafted wills for the Rennies. Although the Rennies and respondent agreed that the matter would be handled on a contingent fee basis, this understanding was not reduced to writing.

After the accident, Mrs. Rennie was treated at Underwood Memorial Hospital from November 13 to November 16, 1987. On November 19, 1987, she was re-admitted to Jefferson University Hospital ("Jefferson Hospital") on a "semi-emergent basis," where she stayed through November 23, 1987. Respondent made the arrangements for Mrs. Rennie's admission to Jefferson Hospital. 3T56.[1]

During the course of the representation, respondent and Mr. Rennie had numerous telephone conversations and two or three meetings at which they discussed the case. (Respondent had no communication with Mrs. Rennie about the personal injury matter except for one occasion in early 1988, when Mrs. Rennie answered a telephone call from respondent to Mr. Rennie. The record does not explain the lack of contact between the two).

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[1] 1T refers to the transcript of the hearing before the DEC on March 21, 1995. 2T refers to the transcript of the hearing before the DEC on May 12, 1995. 3T refers to the transcript of the hearing before the DEC on May 31, 1995. Please note that 2T begins with page 274 and 3T begins with page one.

Respondent instructed Mr. Rennie to submit Mrs. Rennie's medical expenses to his PIP carrier on his own. She advised Mr. Rennie to keep a record of all bills and expenses and to give her copies. According to Mr. Rennie, respondent explained that she had to supply that information to Hanover Metro, the insurance carrier for the other party to the accident. (Respondent testified that, although the material was ultimately provided, she had some difficulty obtaining it from Mr. Rennie). Mr. Rennie testified that at one point he and respondent had discussed filing a products liability suit; respondent had later determined that there was no viable cause of action in that regard.

On a number of occasions, respondent and Mr. Rennie discussed Mrs. Rennie's medical reports. Mr. Rennie recalled respondent's explanation that it was necessary to have a medical report finding a causal link between Mrs. Rennie's injuries and the November 12, 1987 accident before they could proceed with the matter. Mr. Rennie also recalled respondent's statement that it was necessary to prove liability and damage, the latter by way of a medical report.

In August 1988, the Rennies moved to Wisconsin. Respondent and Mr. Rennie continued to discuss the medical reports. Respondent advised Mr. Rennie to find a physician in Wisconsin. Mr. Rennie believed that it was respondent's obligation to obtain the evidence necessary to establish causation between the injuries and the accident. Mr. Rennie knew that respondent would be contacting the physician in Wisconsin to obtain a report about Mrs.

Rennie's condition. It was Mr. Rennie's understanding, however, that the basis to file the lawsuit had been established prior to their move to Wisconsin. He believed that respondent was asking for additional medical reports to bolster their case. Mr. Rennie testified: "[m]y wife was seriously injured in an automobile accident, seriously, and whether [the doctor selected by the insurance company] said it wasn't or whatever they said, I lived with that. I know the girl I married and I was living with the fact and what was happening after the accident." 1T180.

Mr. Rennie did not recall respondent's telling him after the move to Wisconsin that she was having difficulty obtaining a medical report establishing causation between the injury and the accident or that she was not going to file a complaint in their behalf either because she lacked the report or because of any other reason. In fact, although it is not entirely clear from the record what specifically was said or when the conversation(s) occurred, at some point after the move to Wisconsin respondent told Mr. Rennie that she had filed a complaint in the matter. According to Mr. Rennie's testimony, they discussed the details of the case, including the fact that she had lost the docket number and had "reapplied." (It is not clear to what that term referred). The ethics grievance form referenced a statement by respondent to the grievant that "everything was going along fine, it just took a long time to settle these cases due to the large backlog." Exhibit P-1. In fact, respondent had not filed a complaint.

Mr. Rennie testified that his communications with respondent remained active until the end of 1989. Sometime thereafter, Mr. Rennie began to feel that he "was getting the run-around." 1T63. In May 1991, the Rennies retained Howard J. Pitts, Esq., a Wisconsin attorney, to investigate the status of the personal injury matter.

Mr. Pitts testified during the DEC hearing (via telephone) about his communications with respondent. By letter dated May 31, 1991, Mr. Pitts asked respondent to forward the Rennies' original wills to him and inquired about the status of the personal injury matter. The letter states, "[i]t is my understanding that suit has already been filed in this matter" and went on to ask for a copy of the complaint. Exhibit P-13-I. Respondent did not reply to that letter.

Respondent telephoned Mr. Pitts on September 26, 1991, in response to a request by Mr. Rennie. Mr. Pitts was not in at the time and returned her call on September 27, 1991. At that time, respondent told Mr. Pitts that she had not replied to his May 31, 1991 letter because Mr. Rennie had since told her that it was not necessary to do so. Respondent and Mr. Pitts also discussed the Rennies' wills. Respondent told Mr. Pitts that the Rennies probably had the original wills and that she would send him a copy, if she had it. (Mr. Pitts did not recall respondent's forwarding him the wills). The two also discussed the personal injury suit. According to Mr. Pitts, respondent told him that she had filed the complaint "in approximately November, 1989." Exhibit P-13-B. They

further discussed various aspects of the case and, most importantly, the medical reports and the causation issue. Mr. Pitts also testified that respondent mentioned the court backlog in Gloucester County, supposedly where the complaint would have been filed. The Rennies had lived in Gloucester County, which was also the location of the accident. Presumably, respondent would have filed a complaint in that county. According to Mr. Pitts, respondent assured him that she would forward a copy of the complaint to him. She did not, however.

On October 28, 1991, Mr. Pitts spoke with representatives of the Rennies' insurance company and the carrier for the other party. Both complained of their difficulties in communicating with respondent and had no record of a pending case arising from the November 12, 1987 accident. (Respondent acknowledged having received correspondence from Hanover Metro. She explained that she never forwarded any information in reply to the company's request because she did not want to send anything counterproductive to the Rennies' case or admit they had no constructive documentation).

On October 28, 1991, Mr. Pitts contacted the Gloucester County civil case manager's office. As of that date, the court had no record of a pending case. By letter dated November 8, 1991, Mr. Pitts attempted to convey to respondent the information acquired on October 28, 1991 and his belief that no case was pending. Mr. Pitts also demanded a copy of the complaint and the docket number, within five days. Mr. Pitts requested, in the alternative, if there was no pending suit, the name and address of respondent's

professional liability insurance carrier. The letter, which was sent via certified mail to respondent's office, was returned to Mr. Pitts as unclaimed. Respondent did not recall receiving that letter. 3T21.

Thereafter, Mr. Pitts contacted respondent on February 5, 1992. Among other issues, the two discussed again Mrs. Rennie's medical reports and the causation issue. According to Mr. Pitts, respondent again stated that she had filed a complaint and assured him that she would send him a copy. Mr. Pitts testified that he told respondent during their conversation that he did not believe the information she was giving him about the case. Despite her assurances, respondent did not send a copy of the complaint to Mr. Pitts.

Respondent denied having told Mr. Pitts that she filed a complaint in behalf of the Rennies. With regard to Mr. Rennie, respondent contended that she repeatedly told him during their telephone conversations throughout the representation, including just before the statute of limitations ran in November 1989, that she did not have the necessary medical report to pursue the claim.

Mrs. Rennie had a pre-existing back condition and, as discovered during testing after the accident, a degenerative disease of the cervical spine. Respondent was, therefore, concerned about her ability to prove causation between Mrs. Rennie's injuries and the November 12, 1987 accident. Respondent contended that she spoke with Mrs. Rennie's doctors at Jefferson Hospital on more than one occasion. Their conclusion was that Mrs.

Rennie's condition was pre-existing and probably congenital. Indeed, the hospital report refers to a "degenerative disease of the cervical spine." Exhibit P-8. Respondent testified that she conveyed that information to Mr. Rennie, of which Mr. Rennie had no recollection. Respondent added that the Underwood Memorial Hospital report was "non-committal." 3T51.

Gregory Maslow, M.D., the doctor selected by the Rennies' insurance company to examine Mrs. Rennie, prepared a medical report on July 11, 1988. Exhibit R-4. Dr. Maslow's report also refers to a "pre-existent cervical degenerative change," but goes on to state that Mrs. Rennie "in all probability had cervical sprain superimposed." Dr. Maslow stated that it was impossible to say whether Mrs. Rennie's discomfort was causally related to the automobile accident. He wanted to review reports of other tests before further discussing causality. Mr. Rennie recalled discussing this report with respondent, who told him that an impartial doctor, not chosen by the insurance company, would provide a more lenient opinion.

The record shows that respondent did, in fact, seek additional medical reports. On July 1, 1988, respondent sent letters to the individuals then treating Mrs. Rennie in New Jersey, seeking medical reports and an itemization of all charges incurred. The record does not reveal if respondent received replies to her requests. Subsequently, by letters dated February 28, 1989,[2]

[2] Mrs. Rennie did not see a physician in Wisconsin until sometime after December 1988. Therefore, the delay between their move to Wisconsin and the request for a report cannot be attributed to respondent.

respondent forwarded authorizations to Mrs. Rennie's then treating physician in Wisconsin, Dennis W. Western, M.D., and her orthodontist, Richard A. Hovda, D.D.S, M.S., asking for the status of the injury, treatment, prognosis and copies of all bills incurred.[3] (Mrs. Rennie received dental injuries in the accident. The record does not reveal why they were not sufficient to provide the basis for a cause of action). The February 28, 1989 letters were copied to Mrs. Rennie. According to Mr. Rennie, the two letters were the only correspondence they received from respondent.

Dr. Hovda replied by letter to respondent dated March 22, 1989. Exhibit R-8. Respondent stated that Dr. Western did not reply. It does not appear that respondent followed up on her request for a report from Dr. Western. (The Rennies' subsequent attorney, who was retained in January 1993, received reports from Dr. Western that were prepared after the change in attorneys).

Respondent was asked during the DEC hearing if she ever advised the Rennies in writing that she would not pursue the claim in their behalf. She pointed to a letter dated August 12, 1988 (Exhibit R-9) to Mr. Rennie, discussing the problems with the Jefferson Hospital report on the issue of causation. Respondent stated that the third-party's insurance company had asked for information and that it would not be beneficial to give the Jefferson Hospital report to the company. Respondent explained the need for the Rennies to find a doctor in Wisconsin to prepare a

[3] In both letters, respondent stated her belief that they were close to settling the matter. Respondent testified that that "probably was an unfortunate choice of words." 3T201. It is unclear what respondent intended by that statement.

report that would be beneficial to their purpose, adding that "[o]therwise you might as well forget it." Respondent also referred in that letter to the expected report from Dr. Maslow, pointing out that he would be defense-oriented and that, therefore, she did not expect his report to be helpful. Respondent further stated that she would await a response about the "physician problem." (It appears from the date of Dr. Maslow's report that it had been forwarded to the insurance company one month earlier. The record is silent as to when respondent received it). Respondent testified that she did not believe that her letter "left the door open" for a claim to be filed. 3T194. That testimony, however, flies in the face of her testimony that, until the statute of limitations ran, she continued to discuss the need for the medical reports with Mr. Rennie.

Respondent sent the letter to the Rennies' New Jersey address one day after they moved to Wisconsin. Respondent did not receive their new address until later that month. Although the Rennies had left a forwarding address of their local Wisconsin post office when they moved, according to Mr. Rennie they did not receive the letter.

According to respondent, she had suggested to Mr. Rennie that they consult with another attorney; Mr. Rennie's reply had been that it was not necessary. Contrarily, Mr. Rennie did not recall respondent's suggestion that he consult with another attorney. (The question put to Mr. Rennie about respondent's advice that they

seek the advice of another attorney was confined to the time period that the Rennies were living in New Jersey).

* * *

In October or November 1992, Mr. Pitts contacted Jeffrey D. Horn, Esq., an attorney admitted in New Jersey, about the Rennies' matter. The Rennies retained Mr. Horn in January 1993 for two purposes: (1) to pursue an underinsured motorist claim against the Rennies' insurance carrier and (2) to pursue a malpractice claim against respondent. Subsequently, as a result of a settlement reached during an underinsured motorist arbitration, the Rennies were awarded $50,000 from the insurance company and a $10,000 settlement from respondent. (The malpractice settlement is not relevant to the within allegations of misconduct. However, as discussed below, respondent attached a copy of the release to her answer to the complaint).

* * *

The Rennies filed a grievance with the DEC in July 1993. By letter dated July 15, 1993, the DEC investigator asked respondent to reply to the Rennies' grievance within two weeks. Later, however, the investigation was held in abeyance because of the above-mentioned malpractice proceeding. A release in the malpractice action was signed on April 4, 1994 and a stipulation of

dismissal with prejudice was filed on May 17, 1994. Neither document bore respondent's signature.

By letter dated May 25, 1994, the Rennies' attorney, Mr. Horn, notified the DEC secretary of the dismissal of the malpractice proceeding. By letter dated May 27, 1994, the DEC secretary advised the investigator/presenter that the malpractice case had been concluded. The ethics matter was reopened. The letter was copied to respondent. According to the presenter, she learned from the DEC secretary that the letter had been sent to respondent via certified mail along with copies of Mr. Horn's letter and the stipulation of dismissal. 3T37-38. Although not specifically stated in the record, the letter was apparently not returned to the DEC secretary. Respondent did not recall receiving the letter. Thereafter, the investigator made several requests for information from respondent, by telephone and by letter dated July 29, 1994. The July 29, 1994 letter referred to the DEC secretary's May 27, 1994 letter and confirmed a conversation between respondent and the investigator on July 28, 1994, during which respondent stated that she would submit a written reply to the grievance. She did not, however.

The formal complaint was filed on October 10, 1994. Respondent attached to her answer, dated November 30, 1994, a copy of the release in the malpractice action to explain her failure to reply to the DEC. (For unknown reasons, respondent's answer is not a part of the record). Respondent asserted that, at the time she received the grievance, she did not know about the release and

thought the malpractice suit was still pending. Respondent contended that the matter had been settled without her knowledge or consent. She claimed that she thought the investigation in the ethics matter was suspended; hence her failure to reply.

* * *

The DEC determined that respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(c), RPC 4.1(a)(1), RPC 8.1(b) and RPC 8.4(a) and (c). The DEC did not find clear and convincing evidence of a violation of RPC 1.1(b), RPC 1.16 and RPC 3.2. The DEC recommended that respondent be suspended for one year.[4]

* * *

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.

Respondent testified that, as of the date of the DEC hearing, she had not seen a medical report linking Mrs. Rennie's injuries to the accident. However, the reports of Dr. Maslow, Jefferson University Hospital and Underwood Memorial Hospital each refers to

[4] As noted above, respondent has been previously reprimanded. In its report, however, the panel referred to respondent's prior discipline as a three-month suspension. By letter dated August 25, 1995 to the DEC secretary, the panel noted its error and stated that the corrected information had not altered its recommendation.

a cervical sprain, presumably brought about by the accident. Furthermore, in 1994 Dr. Western diagnosed that Mrs. Rennie was suffering from fibromyalgia, which, according to Mr. Rennie and Mr. Pitts, related to the trauma of the November 12, 1987 accident. However, this goes more to the proof required in a malpractice case and, although discussed at length during the DEC hearing, is not relevant in an ethics proceeding.

What happened in the Rennie matter with regard to respondent's pursuit of the personal injury case and later misrepresentation is unclear. Respondent sought medical reports, communicated with doctors and was in frequent contact with her client. This does not appear to be a case where, from the start, the attorney dropped the ball and grossly neglected a case. A prudent attorney would have filed a complaint to preserve the Rennies' rights, but respondent's failure to do so is not unethical, if her testimony that she told Mr. Rennie that she would not file suit may be believed. Her lies to Mr. Rennie and/or Mr. Pitts are, thus, puzzling. Although arguably Mr. Rennie could have been confused and could have misunderstood respondent's statements, the same cannot be said for Mr. Pitts. While one might speculate as to plaintiff's motives, it is clear under any circumstances that respondent took some impermissible actions. Whether they were the product of fear that she had made an error or part of a continuing pattern of neglect is not easily ascertained.

Respondent's contentious demeanor during the ethics hearing did not enhance her credibility. At one point during the hearing,

the panel chair commented on the fact that respondent was proceeding pro se. Her reply was, "I know very well that I have decided to represent myself. Excuse me. I don't think I should have to put out the expense of some attorney to represent me for this kind of bologna." 3T18.

Respondent also asserted that she had not been retained to pursue the personal injury matter. She contended that Mr. Rennie had originally contacted her about a municipal court appearance arising out of the November 12, 1987 accident when he was to appear as a witness. Respondent stated that she later undertook only to investigate whether there was a basis for a claim against the insurance company. However, in several letters respondent referred to Mrs. Rennie as her client and the Rennies clearly thought that she would be instituting suit. Her argument that she was not retained in the personal injury matter is, thus, without any merit.

Respondent also contended that the Rennies were attempting to assert a fraudulent insurance claim. She admitted, however, that she never confronted Mr. Rennie with her belief. Moreover, if that had truly been respondent's opinion, she should have withdrawn from the matter. She cannot use this alleged belief as a defense to the allegations of misconduct. Her claim of fraud on the Rennies' part and her contention that she was never retained appear to be nothing more than an attempt to cover up her misconduct.

At a minimum, respondent failed to prepare and execute a written retainer, failed to communicate clearly to her clients that

a recovery was unlikely and, more seriously, made several misrepresentations to new counsel.

Respondent was also charged with failure to cooperate with the DEC. Her defense that she did not know that the malpractice case had been settled is meritless. Even if respondent had not been so informed by her attorney, unlikely though that is, she was on notice from the resumed contact by the DEC investigator that the investigation was underway. Because, however, respondent ultimately did cooperate with the DEC, the Board saw fit to dismiss this allegation.

As noted above, respondent was previously disciplined. That reprimand did not issue, however, until 1995 and the within misconduct took place before respondent was on notice that her conduct was questionable. Hence, this is not a case where the attorney did not learn from a prior mistake. Her misconduct here, however, was serious and warrants a term of suspension.

The Board unanimously determined to impose a three-month suspension. See In re Moorman, 135 N.J. 1 (1994) (three-month suspension for gross neglect, lack of diligence and failure to keep a client reasonably informed. The attorney had been previously publicly reprimanded). Although respondent's misconduct was not identical to the attorney in Moorman, the misconduct was equally grave.

The Board also determined that, prior to reinstatement, respondent is to produce a report from a psychiatrist approved by the Office of Attorney Ethics, attesting to her fitness to practice

law. Furthermore, upon restoration to the practice of law, respondent is to practice under the supervision of a proctor for one year.

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