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SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 95-493

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IN THE MATTER OF :  
EDWARD FODY :  
AN ATTORNEY AT LAW :  
\_\_\_\_\_

Decision

Argued: March 20, 1996  
Decided: November 18, 1996

Barry N. Shinberg appeared on behalf of the District X Ethics Committee.

Respondent waived appearance for oral argument before the Board.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"), arising out of respondent's handling of a matrimonial proceeding. Respondent was charged with violation of RPC 1.3 (lack of diligence), RPC 1.16(d) (failure to turn over a file), RPC 8.1(b) (failure to cooperate with the DEC) and RPC 1.1(b) (pattern of neglect; specifically, a pattern of failure to cooperate with the DEC, when his prior disciplinary matters were considered. At the DEC hearing, the DEC determined that this was not a violation contemplated by the rule).

Respondent did not file an answer to the complaint. He did, however, appear at the DEC hearing.

Respondent was admitted to the New Jersey bar in 1974. He is engaged in practice in Boonton, Morris County.

Respondent was temporarily suspended, by Order dated August 19, 1996, for failure to cooperate with the DEC and failure to account for \$29,000 in estate funds. Respondent failed to appear on the return date of the order to show cause, whereupon his suspension was continued, by Order dated September 9, 1996.

On March 21, 1995, respondent was reprimanded for unethical conduct in two separate matters. In one matter, respondent failed to act with diligence. In both matters, he failed to cooperate with the DEC. In re Fody, 139 N.J. 432 (1995).

The facts are as follows:

The grievant, Harold Farren, retained respondent in February 1992 to enforce the terms and conditions of a property settlement agreement previously incorporated into a final judgment of divorce. Respondent had not represented Farren in the earlier matrimonial action or drafted the property settlement agreement. As part of the property settlement agreement, Farren had accepted a mortgage from his ex-wife on former marital property to secure her obligation to repay him a sum of money that, with interest, totaled approximately \$92,000 by 1992. Farren wanted respondent to "seize the rents" from the property and foreclose the mortgage. It is undisputed that respondent, at Farren's request, also undertook a number of other efforts, both in pursuit of Farren's rights under the property settlement agreement and in defense of claims asserted by his ex-wife.

In September 1992, respondent filed a foreclosure complaint and notice of lis pendens. Thereafter, Farren's ex-wife filed a motion to interpose defenses relating to other marital issues. As a result of a March 1993 court appearance, respondent understood that the foreclosure file "was to be returned to Trenton" and the marital issues separately considered.

Respondent, thereafter, entered into negotiations toward the resolution of all issues with counsel for Farren's ex-wife. In the summer of 1993, Farren's ex-wife obtained a mortgage commitment in the amount of \$92,500 that respondent thought would be key to the settlement of the outstanding issues. The negotiations continued into May 1994. Believing that the negotiations were progressing and had a reasonable possibility of success, respondent took no further action to pursue the foreclosure proceeding, other than an unspecified number of telephone calls to the court to determine the status of the matter.

Farren had been communicating with respondent and was aware of the steps respondent was taking in his behalf. Farren, however, grew dissatisfied with the lack of results. Specifically, he seemed primarily concerned that respondent had not collected the money due from his ex-wife. By letter dated May 27, 1994, Farren informed respondent that he had retained the law firm of Feldman and Fiorello. He asked that his file be forwarded to John Fiorello, Esq.

Respondent was concerned that his voluntary surrender of the file would result in a forfeiture of his right to assert an

attorney's lien on the case. By letter dated June 8, 1994, respondent told Fiorello that, if Fiorello stipulated that that was not the case, respondent would release the file. Respondent was of the opinion that the reply he received from Fiorello was "equivocal." (Fiorello's letter is not a part of the record). Therefore, respondent did not turn over the file to Fiorello.

Approximately three weeks later, Fiorello filed a motion for substitution of attorney and to compel respondent to surrender over the file.<sup>1</sup> Upon receipt of the motion, respondent filed a letter-memorandum and a certification in opposition to the motion, voicing his concerns about the attorney's lien. The court ordered the transfer of Farren's file. Respondent had the file with him in court on the return date of the motion, July 22, 1994, and immediately turned it over to Fiorello.

Sometime thereafter, Fiorello negotiated a favorable monetary result in Farren's behalf, without resurrecting the foreclosure action.

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The DEC determined that the charges of misconduct against respondent had not been proven to a clear and convincing standard. The DEC noted that respondent had allowed the foreclosure proceeding to remain "on the back burner," while he pursued negotiations in Farren's behalf. Although the DEC found that this

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<sup>1</sup> According to the certifications of Farren and Fiorello, attached to the motion, both had called respondent or his office about obtaining the file on a number of occasions, to no avail. Farren's testimony on this issue differed from his certification. Given the passage of time, it is assumed that the certification is more accurate.

"may not have been the best possible strategy under the circumstances," it concluded that this conduct was not unethical. Similarly, the DEC found that respondent's failure to obtain the money due to Farren from his ex-wife was not an ethics violation. In addition, the DEC believed that it was inappropriate to consider whether respondent had "abandoned" the foreclosure action without taking into account the fact that he had continued to pursue the resolution of a wide range of issues, including the collection of the debt secured by the mortgage. Thus, the DEC did not find that respondent violated RPC 1.3.

With regard to the alleged violation of RPC 1.16(d), the DEC noted respondent's willingness to turn over the file, provided that he be assured that his fee was protected. Under these circumstances, the DEC did not find clear and convincing evidence of a violation of RPC 1.16(d).<sup>2</sup>

\* \* \*

In January 1995, Farren filed a grievance with the DEC. Respondent failed to reply to the DEC investigator's request for a reply to the grievance. The formal complaint was filed with the DEC in April 1995 and served on respondent on May 22, 1995. Respondent failed to file an answer.

The following exchange took place during the DEC hearing on this issue:

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<sup>2</sup> Respondent was also charged with lack of diligence in connection with his failure to turn over the file. That rule is not applicable to this situation and the DEC did not mention it in its findings in this context.

Q. Do you contest the allegation that you failed to cooperate with the investigation of these ethics charges?

A. Well, I would say it was not -- and how could I best say this, my problem with this sort of thing is the fact that -- and I think [the presenter] is aware, is the fact that for some reason or another these are things that just simply mentally I could not really cope with at times.

When you come into this type of situation, I have no problems otherwise, but when it affects me directly, it affects me this profoundly, I do go in a kind of state that -- which I prefer not to deal with it, if I can avoid it here, that is just for this sort of thing here, just for this sort of thing.

And, secondly, when the Complaint was received at that point I was hospitalized, if I recall correctly, it was in May.

And since then I had been on the medication for high blood pressure, which varied in strength and degree and has somewhat affected me. We just now changed that medication, but the earlier one I was taking did affect me adversely.

[T10/3/95 99-100]

The DEC found that respondent had violated RPC 8.1(b), based on his failure to reply to the DEC investigator's request for information and to file an answer to the complaint. The DEC considered these as two separate violations of RPC 8.1(b).

\* \* \*

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 was fully supported by clear and convincing evidence. Indeed, the DEC's findings in this matter are sound. Although respondent did not necessarily undertake the most prudent course of conduct in connection with either the foreclosure or the surrender of Farren's file, his actions in the Farren matter did not rise to the level of unethical conduct.

It is respondent's failure to cooperate with the DEC that is troubling. He was previously disciplined for the same type of behavior toward the DEC. As noted above, in March 1995 respondent was reprimanded for lack of diligence in one matter and failure to cooperate with the DEC in two matters. With regard to the timing of these instances, as noted above, the grievance in the present case was filed in January 1995. The record does not reveal the dates of the investigator's letter(s) to respondent. However, the Board's decision in respondent's earlier disciplinary matter was made the previous September. There is no doubt that by, January 1995, respondent was on notice that his behavior in this regard was unethical. By March 1995, he had been disciplined for that behavior. Despite that knowledge, respondent failed to file an answer to the formal complaint that was served on him on May 22, 1995. Additionally, the DEC sent respondent a letter, dated July 12, 1995, asking that he reply to the complaint within five days and serving to amend the complaint to include a charge of violation of RPC 8.1(b) for his failure to file an answer.

As noted above, respondent referred to his high blood pressure and hospitalization by way of explanation for his failure to cooperate with the DEC.<sup>3</sup> At a minimum, however, respondent could have contacted the DEC, explained the situation and replied at a later date. Furthermore, his hospitalization does not explain his failure to reply to the investigator's request for information,

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<sup>3</sup> Respondent waived his appearance before the Board because of health concerns.

presumably made several months before his hospitalization. Respondent also mentioned his inability to reply to disciplinary matters. This same argument, however, was raised at his previous appearance before the Board, in June 1994:

[Respondent] As far as the reaction to the ethics charges are concerned, I just simply could not bring myself to do anything. I don't know what it is, it's a psychological thing. But every time I picked this up to respond I had to put it down again. I just simply could not bring myself to do it.

[Board Member]: Sir.

[Respondent]: Yeah.

[Board Member]: The phrase psychological block was used.

[Respondent]: Um hmm.

[Board Member]: Should we be concerned that you're gonna have a psychological block in the future if something goes adverse to you?

[Respondent]: No. I think not. I think not. It only had to do with these particular areas. I have no psychological block in responding on behalf of my clients at all through the years.

[Board Member]: Well, what happens if someone charges you again, or complains about something that you've done. Do you think you can face it and deal with it as opposed to ignore it?

[Respondent]: My immediate reaction then will be to retain an attorney at once. Which is what I should have done in this case, but did not till later on in the game.

Ordinarily, the Board takes an indulgent view of an allegation of failure to cooperate with the DEC where an attorney initially fails to cooperate with the investigation but then appears at the DEC hearing. Here, however, it is obvious that respondent did not learn from his previous mistake. His alleged inability to deal



with disciplinary matters is no excuse for ignoring the DEC investigator's request for information and for failing to file an answer. Despite a previous reprimand, respondent repeated his behavior. Thus, the Board unanimously determined that a second reprimand is necessary to drive the point home for respondent that he has a duty to cooperate with the DEC. See In re Skokos, 113 N.J. 389 (1988) (public reprimand imposed where the attorney failed to reply to the investigator's requests for information, failed to file an answer to the complaint and failed to appear at the DEC hearing).

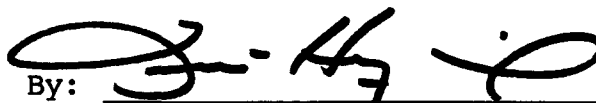
Three members did not participate.

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

Dated: \_\_\_\_\_

11/12/86

By: \_\_\_\_\_



Lee M. Hymerling  
Chair  
Disciplinary Review Board