

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-387

IN THE MATTER OF :
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 :
 F. GERALD FITZPATRICK, :
 A/K/A GERALD F. FITZPATRICK :
 :
 AN ATTORNEY AT LAW :
 :

Decision

Argued: January 31, 1996

Decided: September 16, 1996

Bennett Wasserstrum appeared on behalf of the District XI Ethics Committee.

Respondent waived appearance.

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 an admonition filed by the District XI Ethics Committee (DEC), which the Board determined to hear pursuant to R.1:20-15(f)(4). The complaint charged respondent with a violation of RPC 1.4 (failure to communicate), stemming from his handling of a personal injury matter.

Respondent was admitted to the New Jersey bar in 1971. He maintains an office for the practice of law in Bayonne, Hudson County.

Respondent was privately reprimanded by letter dated June 28, 1989 for accepting a settlement offer without his client's express consent.

The facts of this matter are as follows:

Respondent represented Valerie Hana in a personal injury suit against Sickel's Cherry Hill Shop Rite, arising from a July 25, 1988 fall sustained by Ms. Hana. Respondent filed a complaint in Ms. Hana's behalf in December 1988. As a result of an arbitration proceeding on October 18, 1989, Ms. Hana was awarded \$100,000. According to Ms. Hana, respondent advised her that she could recover a larger sum in court. Subsequently, a request was made for a trial de novo, although it is unclear by whom.

The matter was set for trial on July 9, 1991. Due to a scheduling conflict, respondent was unable to appear on that date. He sent his then associate, John J. Smith, Jr., Esq., to request an adjournment because of medical expert problems. Respondent, who had known about these problems in advance, had not previously requested an adjournment. The court did not grant the adjournment and assigned the case out for trial.

Mr. Smith telephoned respondent to advise him that the request for an adjournment had been denied. There was, at that time, a \$9,500 settlement offer on the table. According to respondent, he instructed Mr. Smith to inform the court that the case had been settled for \$9,500, subject to Ms. Hana's approval. It appears that respondent accepted the \$9,500 offer because he was concerned

about Ms. Hana's chance of success at trial without a medical expert.

Because Mr. Smith did not testify before the DEC, the record does not reveal what was said to the court. The case, however, was marked "settled" and removed from the trial list.

Subsequently, in July or August 1991, Ms. Hana met with respondent. At that time, he conveyed the \$9,500 offer to her. Ms. Hana rejected the offer. (It is unclear if Ms. Hana had also rejected the \$9,500 offer before the July trial date). Respondent did not tell Ms. Hana that the case had been "settled" but, rather, that it would be heard the following January.

Thereafter, Ms. Hana contacted respondent's office on a number of occasions to ascertain when her case would be heard. Respondent did not return her calls.

After the "settlement" failed to be finalized, it appears that the case was dismissed. The record does not reveal when Ms. Hana learned about the outcome of her case. On an undisclosed date, Ms. Hana retained new counsel. On August 13, 1992, a hearing was held on her counsel's motion to vacate the settlement and restore the matter to the trial calendar. After respondent testified in behalf of Ms. Hana, the case was reinstated. The court then referred the matter to the DEC for an investigation of respondent's conduct.

The DEC record is quite brief. The underlying facts were ascertained primarily through the transcript of the August 13, 1992 hearing to vacate the settlement. Respondent's testimony before the DEC consisted predominantly of setting forth mitigating

factors. Respondent explained that his father was suffering from cancer during the time in question and had died in May 1992. Respondent testified that his father's illness affected his practice. He admitted that "it's possible, I wasn't as attentive to my office and my clients as I should have been during that time." T7/6/95 19.

* * *

The DEC found that respondent had violated RPC 1.4, in that he "failed to consult with and advise his client as to the status of the proceedings, and when he subsequently did advise his client, the advise [sic] was incorrect." The DEC noted, apparently in mitigation, that respondent testified in Ms. Hana's behalf at the August 13, 1992 hearing, cooperated with the DEC investigator and candidly acknowledged his wrongdoing, for which he expressed regret. The DEC also recognized the effect of his father's illness on respondent. The DEC recommended an admonition.

* * *

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.

There is no question that the record supports a violation of RPC 1.4, in that respondent failed to reply to Ms. Hana's calls requesting information on the status of her case. In addition, respondent was guilty of a violation of RPC 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation), in that

he misrepresented the status of the matter to Ms. Hana during their meeting after the trial and also subsequently, through his silence.

The Board recognized several other potential areas of misconduct with which respondent was not charged. For example, respondent might have been guilty of misrepresentation to a tribunal, in violation of RPC 3.3 and RPC 8.4(d) (conduct prejudicial to the administration of justice). The key to that determination is what respondent instructed Mr. Smith to tell the court about the settlement. Without the transcript of the July proceeding or Smith's testimony, however, the Board was unable to make a finding in this regard. The record also gives rise to a question of whether respondent was guilty of lack of diligence and/or gross neglect. As mentioned above, respondent did not request an adjournment before the morning of the trial, although he knew about the problem with their medical expert for some time. Also, opposing counsel mentioned during the August 13, 1992 proceeding that there had been three or four trial calls in the matter. Because, however, there were no formal allegations in this regard, the Board made no finding on this score.

Lastly, a question arose as to whether respondent allowed a critical issue in Ms. Hana's matter - a miscarriage she allegedly suffered as a result of her fall - to be barred from the case. See Exhibits C-5 and C-6. (Ms. Hana testified at the August 13, 1992 hearing that respondent had not informed her of the orders barring the miscarriage claim). Again, respondent was not charged with misconduct in this regard and the Board made no corresponding findings.

Of concern to the Board was respondent's previous discipline for conduct quite similar to that alleged here: accepting a settlement offer without his client's consent. The misconduct in that matter occurred in 1987 and the letter of private reprimand was issued in 1989, well before respondent's misconduct in this matter. It is clear, thus, that respondent did not learn from his prior mistake.

In light of the foregoing, the Board unanimously determined to impose a reprimand. See In re Kasdan, 115 N.J. 472 (1989). One member did not participate.

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

Dated: _____

9/6/96

By:  _____

Lee M. Hymerling
Chair
Disciplinary Review Board